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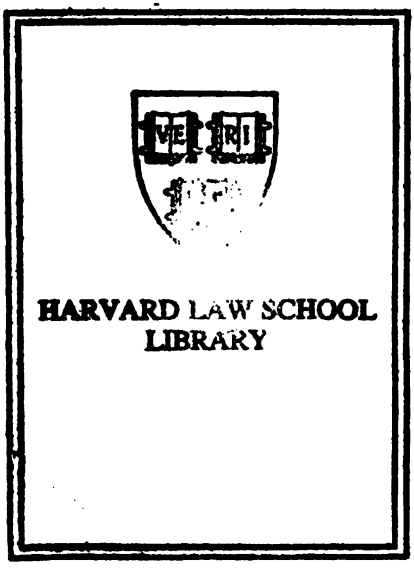

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REPORT OF CASES

DECIDED BY THE

SUPREME COURT

OF

MISSISSIPPI,

AT THE

MARCH TERM, 1904, AND NOVEMBER TERM, 1904.

Vol. 84.

REPORTED BY
T. A. McWILLIE.

NASHVILLE, TENN.:
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[1] CHANCELLOR HENRY L. MULDROW, of the First District, died in March, 1905, and HON. WILLIAM J. LAMB was appointed March 6, 1905.

[2] CHANCELLOR CARY C. MOODY resigned November 12, 1904, and HON. PERCY BELL was then appointed.

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AMENDMENTS

TO THE

RULES

OF THE

SUPREME COURT OF MISSISSIPPI.

AMENDMENT No. 1.

NOVEMBER 16, 1905.

Ordered by the Court that Rule 8 of the Supreme Court be amended to read as follows:

RULE 8. *Briefs, Submission and Setting of Cases.* — No brief shall be filed by the Clerk for either side unless there is appended a certificate that a copy of it has been delivered, or mailed to the opposing party or his counsel, or the original submitted for examination, and also a notice whether or not oral argument is desired.

All cases in which no request for oral argument has been made shall be submitted on the first day of the term or time appointed for taking up the docket of the district to which the case belongs. All cases in which request for oral argument has been made shall be by the Clerk in his judgment set for hearing in the order of their filing. All cases shall be so distributed as to insure ample business for each court day, but no case shall be set for hearing during the last week of any term. In all cases to be submitted without oral argument, appellant's

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brief shall be filed not later than twelve days before the first day of the term or time appointed for taking up the docket of the district to which the case belongs, and appellee's brief not later than five days before said time, and any rejoinder brief by appellant not later than said return day; the same number of days applying before the hearing in appeals returnable at any time. In all cases to be argued orally appellant's brief shall be filed not later than twelve days before the day on which the case is set for hearing, and appellee's brief not later than five days before said time, and any rejoinder brief by appellant not later than the day on which the case is set for argument.

A true copy from the minutes.

GEO. C. MYERS, *Supreme Court Clerk.*

AMENDMENT No. 2.

NOVEMBER TERM, A. D. 1905; MONDAY, JANUARY 16, 1905.

Ordered by the Court that the following be added to Rule 1, in regard to Transcripts:

When Filed — Where the appeal has been perfected fifty days before return day, and the appellant fails to file in the office of the Clerk of this Court, the transcript of the record of the case, twenty days before the time for taking up the docket of the district to which the case belongs, the case shall go to the heel of the district docket for that term, and the appellant shall be taxed with the costs of appeal.

A true copy from the minutes.

GEO. C. MYERS, *Supreme Court Clerk.*

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AMENDMENT No. 3.

NOVEMBER TERM, A. D. 1905; MONDAY, JANUARY 16, 1905.

Ordered that the following Rule of this Court be adopted:

RULE 32.

Penalty for the Violations of the Rules of this Court.—Any litigant, who, by himself or his counsel, fails to comply with any of the provisions of the foregoing Rules, shall, on motion of the party aggrieved, be taxed with such proportion of the appeal costs as in the judgment of the Court may seem just and proper.

A true copy from the minutes.

GEO. C. MYERS, *Supreme Court Clerk.*

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CASES ARGUED AND DECIDED

—IN THE—

SUPREME COURT OF MISSISSIPPI,

—AT THE—

MARCH TERM, 1904.

ALABAMA AND VICKSBURG RAILWAY CO. *v.* DAVID LIVINGSTON.

1. RAILROADS. *Trespasser. Freight train. Erroneous information. Track supervisor.*

A person is a trespasser, though not a willful one, and not a passenger under an implied contract, who boards a freight train which does not carry passengers, believing from erroneous information given him by the railroad company's supervisor of tracks that he had the right to take passage thereon.

2. SAME. *Ejection. Trespasser. Cursing and abusing.*

A railroad company is liable for the misconduct of the conductor of its freight train, which did not carry passengers, if he curse and abuse a trespasser on ejecting him from the train.

3. SAME. *Damages. Excessive verdict.*

Where plaintiff boarded a freight train erroneously believing that he had a right to travel thereon, and was expelled by the conductor, between stations on a stormy night, with abuse and cursing after an offer to pay his fare, a judgment for $2,000 in favor of plaintiff is excessive, and will be reversed unless $1,000 be remitted.

FROM the circuit court of Scott county.
HON. JOHN R. ENOCHS, Judge.

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Statement of the case.

Livingston, appellee, was plaintiff, and the railway company, appellant, was defendant in the court below. From a judgment for $2,000 in plaintiff's favor, the defendant appealed to the supreme court.

The evidence for plaintiff was that he and a companion were at Forest, a station on defendant's road, and intended to take the passenger train going east late that night for Meridian. About 8 or 9 o'clock that night they were in a barber shop, and in a conversation with a Mr. Bustin, who was track supervisor of defendant's road, said something about the lateness of the time for the arrival of the passenger train, when Bustin told them that they could go on the through freight train. They in a short time thereafter got on the through freight, and the conductor came around and asked them if there were some cattle to go on the train, to which they replied they did not know. The conductor then went about his business, and in twenty minutes thereafter the train left Forest, and when about half way to the next station the conductor came to them and told them they could not ride on that train, and that he would put them off at Lake. When the train reached Lake it did not stop, but went by three or four miles, when the train was stopped, and they were put off. Plaintiff testified that he informed the conductor that Bustin told him he could ride on the train, or he would not otherwise have gotten on. Plaintiff could not reason with the conductor; offered to pay him for his passage, but every time he said anything about pay the conductor would curse him, and every time he tried to reason with the conductor he would curse and abuse him; that he then offered the conductor $10 if he would take him to the next station, and the conductor replied: "I will not take your money; I believe you are a damned railroad spy, anyhow;" it was a cold, dark night, and was raining, and plaintiff and his companion had to walk back to Lake three or four miles. The testimony for defendant was that Bustin did not tell plaintiff or his companion that they could ride on the through freight train; that the conductor never

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Brief for appellant.

saw them until the train left Forest, and that he told them between Forest and Lake that they could not go on that train, and that he would put them off at Lake; that when they reached Lake it was raining, and the smoke was so heavy the signal to stop could not be seen, and the train ran through about a mile, when it stopped, and plaintiff and his companion were then put off without insult; that Bustin had no authority to give any one permission to ride on the freight train; and that the train was not authorized to carry passengers except when they were in charge of cattle. Defendant's motion for a new trial was overruled.

McWillie & Thompson, for appellant.

The liability of a railroad company for ejecting a passenger or other person for cause at a place distant from any station or dwelling house is purely statutory. *Great Northern R. Co.* v. *Miller,* 19 Mich., 305.

There is no rule of the common law requiring a person who is ejected for cause to be put off at any particular place, only it must be at a place where it will not subject him to great peril; therefore such person cannot, at common law, recover for being put off at an inconvenient place. *Great Western R. Co.* v. *Miller, supra; Hall* v. *So. Car. R. Co.,* 28 So. Car., 261; *So. Fla. R. Co.* v. *Rhodes,* 25 Fla., 40.

This is entirely agreeable to the doctrine of this court that to train trespassers railway companies owe no duty save to refrain from doing them wanton or willful hurt. *Railroad Co.* v. *Burnsed,* 70 Miss., 437.

The plaintiff undertook to show that he was not a trespasser because, as he testified, he had gotten *verbal* permission from one Bustin, *a track supervisor,* to ride on the freight train. As the court will see, Bustin and two other persons who were present at the time of the alleged conversation (Simmons and Harrison), deny that any such permission was given, but it was not

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pretended that Bustin had any authority to grant such permission, and, singularly enough, after introducing the evidence of such permission, *the plaintiff's counsel asked and obtained an instruction to the effect that Bustin had no such authority.* The plaintiff's testimony leaves him in a peculiar attitude as to this matter, since he says he relied on Bustin's word as giving him permission to ride on the train, but did not know that the train could not take passengers without permission. According to his own showing, he proceeded on the mere verbal authorization of a man whom he did not know to be authorized to give such permission and who in fact had no such authority. If such permission was given, and he relied on it, it was his own folly, and it had no effect on the duties of the other servants of the company who knew Bustin could not give such permission and that they had to obey orders without reference to Bustin, who was an inferior officer belonging to a department that had nothing to do with train service.

The verdict is wrong because the plaintiff did not have the implied assent of the conductor to ride on the train and was a mere trespasser, and properly ejected. And the court below erred in so modifying the instructions asked by the defendant as to deny the defendant the right to a verdict if the conductor had impliedly consented to plaintiff's riding on the train. The conductor had no right to give such consent either expressly or impliedly and there was no evidence that he did so.

The verdict of $2,000 is outrageously excessive. The plaintiff and his companion have to thank their own folly for what befell them and for a walk back to Lake; although the night was a disagreeable one, no such sum should have been allowed even in a case of liability. Neither of them sustained any injury, or were made sick in any way. Most men are satisfied to come out even after a drunken frolic, and no reason can be found why this one should result in the enrichment of appellee.

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Brief for appellee.

R. S. McLaurin, S. L. McLaurin, and *Green & Green,* for appellee.

The conductor was the officer and the only one present in absolute control of the train, with the apparent right to say who, if any one, should travel on it; and when he permitted the plaintiff to take passage on it, as may be fairly inferred from the evidence of the plaintiff that he did, the plaintiff without notice of any want of authority in the conductor to grant such permission and in the absence of collusion between him and the conductor to defraud the company of its fare, whether he paid it or not, became a passenger of the defendant and entitled to his rights as such. Wood Railway Law, 1039, note 3; *Creed* v. *Pa. R. Co.,* 86 Pa., 139; *St. Joseph & W. R. R. Co.* v. *Wheeler,* 35 Kan., 185; *Dunn* v. *Grand Trunk R. Co.,* 58 Maine, 187; *Wilton* v. *Middlesex R. Co.,* 107 Mass., 108; *Ohio & M. R. Co.* v. *Muhling,* 30 Ill., 9; *Sherman* v. *Hannibal & St. J. R. Co.,* 72 Mo., 63; *Muelhausen* v. *St. Louis R. Co.,* 91 Mo., 344, 6 West Rep., 857; *Jacobus* v. *St. Paul & C. R. Co.,* 20 Minn., 125 (Gil. 110); *Wagner* v. *Mo. Pac. Ry. Co.,* 3 L. R. A., 156.

In *Whitehead* v. *St. Louis, Iron Mountain and Southern Ry. Co.,* 6 L. R. A., 411, the court says: "It is next insisted and, indeed, the proposition lies at the foundation of all the objections made to the judgment in this case, that the conductor had no power to permit the boy to ride on the train, because the defendant's rules forbade the conductor to carry passengers on this particular train. From this the conclusion is sought to be made that the boy was wrongfully on the train, and entitled to no care from defendant. The rule of law asserted on all hands is that the master is civilly liable for the negligence or wrongful acts of his agent when done in the course of the agent's employment, even though the master may have prohibited the agent from doing the act of which complaint is made." *Garratzen* v. *Duenckel,* 50 Mo., 107; *Cousins* v. *Hannibal & St. J. R. Co.,* 66 Mo., 576; *Ramsden* v. *Boston & R. R. Co.,* 104 Mass., 120.

That the conductor went beyond his instructions does not re-

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lieve the company. See *Richberger* v. *Express Company,* 73 Miss., 161.

Argued orally by *T. A. McWillie,* for appellant, and *S. L. McLaurin* and *Marcellus Green,* for appellee.

WHITFIELD, C. J., delivered the opinion of the court.

We do not think there was any implied contract to carry appellee as a passenger. He must be treated as a trespasser, but not as a willful trespasser. He must be regarded as having boarded the train believing that Bustin had authority to allow him to travel on a freight train. But the evidence makes it equally clear that he was put off under circumstances of insult and outrage, and that, too, by the conductor acting in the line of his duty. The conductor had a right to put him off under proper circumstances and at a proper place and time (*Hudson* v. *Lynn & B. R.,* 178 Mass., at page 67, 59 N. E., 647; *Louisville, etc., R.* v. *Sullivan,* 81 Ky., 634 [50 Am. Rep., 186]); but it was his duty, even towards this trespasser, not to willfully and maliciously wrong him by insulting and abusing him when he put him off. Because of the mode in which he was ejected, to wit, because of the cursing and abuse on the part of the conductor, we think the company is liable for punitive damages.

My brethen think, however, that the damages are too large, and that $1,000 only should be allowed. I would prefer to allow the full amount to stand, speaking for myself, under all the circumstances of this case; but my conviction is not strong enough to warrant dissent about a mere matter of damages.

If, therefore, the appellee will remit $1,000, *the judgment will be affirmed; otherwise the cause will be reversed and remanded.*

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Brief for appellant.

TOWN OF HAZLEHURST *v.* MYRA B. MAYES. 84 7 95 275

1. MUNICIPALITIES. *Streets. Additional servitudes. Abutting owner. Compensation.*

The owner of land abutting on a street, whether he own the fee to the street or it be in the municipality, is entitled to compensation for any additional servitude placed on his property by any use of the street not incidental or necessary to its enjoyment as a street by the public.

2. SAME. *Lights. Code* 1892, § 2947. *Trimming shade trees.*

But a municipality may, without compensating the abutting owner under Code 1892, § 2947, giving it full jurisdiction over streets with power to light them, trim trees standing between the sidewalk and the street to any extent necessary to prevent interference with the wires of an electric light plant erected by it.

FROM the circuit court of Copiah county.

HON. DAVID M. MILLER, Judge.

Mrs. Mayes, appellee, was plaintiff in the court below; the town of Hazlehurst was defendant there. From a judgment in plaintiff's favor defendant appealed to the supreme court. The facts are stated in the opinion of the court.

J. S. Sexton, for appellant.

The town of Hazlehurst, being governed by chapter 93 of the Annotated Code, has the power under § 2932, "To grant the right for the erection of telegraph, electric light or telephone poles, posts and wires along and upon any of the streets, alleys or ways of the municipality, and change, modify and regulate the same. But such privilege shall not be exclusive."

Under § 2938, said town has power "to make all needful police regulations necessary for the preservation of good order and the peace of the municipality; and to prevent injury to, destruction of, or interference with public or private property."

Under § 2947 it has power "to exercise full jurisdiction in the matter of streets, sidewalks, sewers and parks; to open

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Brief for appellee.

and lay out and construct the same; to repair, maintain, pave, sprinkle, adorn and light the same," of all of which and other powers possessed by this municipal corporation, this court takes judicial notice under § 3038 of said chapter.

In the case of *Mt. Carmel* v. *Shaw,* 155 Ill., 37, the following quotation from the syllabus correctly announces the conclusion of the court, "Shade trees in the public streets of a city are the property of the municipality, and it has complete control over them, and may, therefore, destroy them, when necessary, in the progress of constructing a sidewalk."

By the act of incorporation, the city of Mt. Carmel had "power to lay out, establish, open, alter, widen, extend, grade, pave or otherwise improve its streets and sidewalks, and vacate the same."

The town of Hazlehurst, under the municipal code chapter, has all these powers and more. In other words, it has "full jurisdiction in the matter of streets, sidewalks," etc.

In the case of *Village of Hyde Park* v. *Durham,* 85 Ill., the court said: "The corporate authorities are vested with complete control, as is every other municipal corporation, over its streets. They may contract or widen them whenever, in their opinion, the public good shall so require. Property owners purchase and hold subject to these powers, and they have no vested right to deny the widening, contracting or otherwise improving any street."

Shade trees standing in a public street near the line of the sidewalk may be cut down and removed by the municipal officers in pursuance of the authority which the city possesses over its streets and sidewalks." *Chase* v. *City of Oshkosh,* 81 Wis., 313 (29 Am. St. Rep., 898, and note); *Chase* v. *City of Oshkosh,* 29 Am. St. Rep., 903.

R. N. & H. B. Miller, for appellee.

Nobody questions the right of the town to erect an electric light plant and string its wires on the streets nor its authority

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Brief for appellee.

under the right of eminent domain to condemn the interest of plaintiff in the trees, and to cut them. But in the case of *Stowers* v. *Postal Telegraph & Cable Co.,* 68 Miss., 559, this court held, "Whether the fee in a street is in the abutting owner or in the public, a municipal corporation cannot authorize a telegraph company to construct its line along a public street without first making compensation to such owner, since the line, being no part of the equipment of the street, but foreign to its use, is an additional servitude."

Adjacent landowners may lawfully use the space between the carriage way and the sidewalks for the growing of trees for ornament or use. Trees thus situated are in no sense nuisances, but private property specially protected by statute. *Graves* v. *Shattuck,* 35 N. H., 257; 69 Am. Dec., 536. The owner of land appropriated as a highway retains his exclusive right in trees and shrubs growing on the land so appropriated for every purpose not incompatible with the public right of way, and he may maintain an action against any individual who, not acting under statutory or official authority, destroys or removes the trees or shrubs standing or growing in the highway, unless they constitute an obstruction, hindrance or annoyance to travelers. *Phifer* v. *Cox,* 21 Ohio St., 248 (8 Am. Rep., 58).

Judge Cooper, quoting in this case from the case of *Theobold* v. *L., N. O. & T. Ry. Co.,* 66 Miss., 279, says: "There is no difference in right (of an abutting owner) in cases where the owner of the abutting land owned the fee to the center of the street, and those in which the fee was in the public."

The above two cases, together with the case of *Cassedy* v. *Telephone Co.,* 78 Miss., 666, absolutely settles and puts beyond disputation in Mississippi that the stringing of electric wires along a public street and trimming of trees in the sidewalk without first having condemned the property and made compensation to the owner, is an additional servitude, and an invasion of the abutting owner's right, for which he can maintain

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damages against the wrongdoer. It matters not what the law may be elsewhere, these cases settle the law of this case in Mississippi.

TRULY, J., delivered the opinion of the court.

The town of Hazlehurst, through its board of mayor and aldermen, decided to construct a municipal waterworks and electric light system. In the construction of this plant it became necessary to establish and locate a system of posts and wires over the streets of the town. In the course of this work the contractor who was installing the plant found that the wires were interfered with by shade trees planted along the sidewalks of the public streets. The difficulty being reported to the municipal authorities permission was granted the contractor and his employes to trim, whenever necessary, all trees which were on the line of the electric light wires. In so doing five shade and ornamental trees located between the sidewalk and the public street in front of appellee's residence were, contrary to her wishes, trimmed, and in consequence thereof their symmetry was marred, and their value as shade trees diminished. For this damage appellee sued, and the jury awarded her a verdict in the sum of $125. The appellant defended on two grounds: First, that the cutting was inflicted by the employes of an independent contractor, and that, therefore, the town was not liable; second, that this was a legitimate exercise of the power of the municipality in pursuance of the authority and jurisdiction granted it by law over the public streets of the town. Appellant asked that these two phases of its defense be presented to the jury by appropriate instructions, but these were by the court refused, and the case was at last submitted to the jury on the sole question of what amount of compensatory damages the appellee was entitled to recover.

The second contention presents the question of prime importance. By § 2947 of the code of 1892 all municipalities in this

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state operating thereunder are granted authority "to exercise full jurisdiction in the matter of streets, to open, lay out and construct the same; to repair, maintain, pave, sprinkle, adorn and light the same;" and by section 2964 the additional power is granted to towns "to provide for the lighting of streets, parks and public grounds, and the erection of lamps and lamp posts." The power of municipalities over the streets within their limits has been the subject of repeated judicial inquiry. In this state it has been decided that the rule was the same whether the fee in the highway was vested in the municipality or in the abutting owner, and in either event the rights of the abutting owner in reference thereto were protected. It has also been held that the abutting owner was entitled to recover compensation for any additional servitude which might be placed on his property by the use of the highway. In *Theobold* v. *Railroad Co.*, 66 Miss., 279 (6 So. Rep., 230; 4 L. R. A., 735; 14 Am. St. Rep., 564), the supreme court said that the establishment of a steam railroad upon the street was such an additional servitude as entitled the abutting owner in front of whose property the railroad was constructed to recover damages, and the application of the same rule has been announced in reference to both telegraph and telephone companies. *Stowers* v. *Telegraph Co.*, 68 Miss., 562 (9 So. Rep., 356; 12 L. R. A., 864; 24 Am. St. Rep., 290); *Telephone Co.* v. *Cassedy*, 78 Miss., 666 (29 So. Rep., 762). The real rule of right in the premises, as we understand it, is this: Whether the fee be or not in the abutting owner, he is entitled to free ingress and egress to his property, and to the customary use of the street, and has the right to be compensated for any additional servitude which may be placed on his property by any use of the highway not incidental or necessary to its full enjoyment as such by the public. This brings up for decision the question of what is and what is not a necessary equipment for the public convenience. In *Gulf Coast Co.* v. *Bowers*, 80 Miss., 581 (32 So. Rep., 114), in an admirably clear and lucid opinion, Terral, J., after a full collation of all the authorities,

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announced that lighting of the streets by the municipality was a reasonable and legitimate exercise of municipal authority, and that the abutting owner was not entitled to recover for the inconvenience or damage occasioned by the location in front of his property of the necessary poles and wires of an electric light company which had been contracted with by the municipality for public lighting. We cannot do better than to quote, as applicable to this case, and to a great degree controlling it, the following language from that opinion: "The authorities are quite uniform that a city or town may light its streets as a means of making them more safe and convenient for public travel. The right to light the town is presumed to have been acquired and paid for, as incident to the right of public passage, when the property was condemned or dedicated for public use. In other words, the taking of the land for use as a street includes not only the right of passage, but of securing a convenient and safe passage; to light it, if you please, for that purpose. It is not a new taking of property for public use, but a completing to that extent of the uses of the first taking by adding appliances included within it, and now constructed by reason of the public need. While the lighting of the streets of a city may be a great convenience to the traveling public, especially under some conditions, the poles, wires, and other necessary appliances for so doing are often a positive inconvenience to the abutting landowner, considered merely as such. But the proprietary rights of the landowner, whether the fee or a mere easement thereon be in the public, are greatly modified by the rights of the public, which is entitled to a free passage over the streets, and to the benefit of lights constructed and operated for that end." It should be noted that the language of the charter there under review was not so broad in its grant of authority as are the statutory provisions hereinbefore quoted, and under which the town of Hazlehurst operated. The reason for the distinction thus clearly drawn between electric light wires and telephone and telegraph wires, though the equipment in each in-

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stance is practically the same, is obvious. Lights are convenient, often necessary, to insure the full and complete use by the public of the streets as highways. Lighting is incidental to their use, and therefore the abutting owner is held to have been fully compensated when the highway was originally acquired. But telephone and telegraph systems, while often public conveniences, are not incidental to the use of the streets as highways, and the enjoyment and use of the street as such is not increased by such equipment. All such equipments constitute a diversion of the highway from the purposes for which it was originally designed, and hence are an additional burden on the easement. As said in *Stowers* v. *Telegraph Co., supra,* they "form no part of the equipment of a public street, but are foreign to its use." For any diversion from the original purpose, for any additional servitude imposed by an equipment foreign to its use, for any new or additional taking for public use, or for consequential damages inflicted by an improper use, the abutting owner is entitled to full compensation, because such rights are not presumed to have been acquired by the original taking. But, as the public use is the dominant and controlling interest, the streets may be devoted to any proper use incident to a public thoroughfare, and the adjacent owner must suffer the resulting injury or inconvenience. So that the authorities of a municipality may, when its charter powers permit, on its streets dig drains, lay gas pipes or water mains, construct sewers, or erect posts and wires for lights, because such things and other incidental uses are within the contemplated scope of the dedication of the highways to the public use. Briefly stated, the municipality has the power to make such legitimate use of the highway as is for the benefit of the community at large, and may, without additional compensation to the abutting owner, place any equipments or appliances in the streets which are necessary, convenient, or incidental to their full use and enjoyment as such. *Gulf Coast Co.* v. *Bowers,* and authorities there cited; Elliott's Roads and Streets (2d ed.), sec. 707; Dillon's Mun.

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Corp. (4th ed.), 697. If, then, it be true that a municipality having proper charter power is authorized to establish an electrict light plant without being liable to the abutting owners for any damages consequent upon such construction and subsequent maintenance, it necessarily follows that it is vested with authority to remove from the streets any obstruction of any kind which interferes with the construction of such equipment. And this rule is also based upon the fundamental principle that the rights of the adjacent owners are subordinate to the public interest. As the municipality has the right to establish the electric light wires and posts, the citizen's right to maintain trees upon the highways is subordinate and must yield thereto. Keasbey, Electric Wires (2d ed.), sec. 106; Smith, Mun. Corp., sec. 1311; *Wyant* v. *Telephone Co.* (Mich.), 81 N. W., 928 (47 L. R. A., 497; 81 Am. St. Rep., 155); *Tate* v. *Greensboro* (N. C.), 19 S. E., 767 (24 L. R. A., 671); *Wilson* v. *Simmons,* 89 Me., 242 (36 So. Rep., 380); *Vanderhurst* v. *Tholeke,* 113 Cal., 147 (45 Pac., 266; 35 L. R. A., 267). Cases might arise when, on account of malicious and unnecessary destruction of trees on the sidewalk, the abutting owner can maintain an action for damages against the municipal authorities; but such case is not presented here by either the pleadings or the proof. The whole question has been repeatedly discussed before many tribunals, and the conclusions announced have been arrived at in the great majority of cases. Under the facts disclosed by this record the trees in question, being in front of the residence of appellee and between the public sidewalk and the public highway, in the line of and interfering with the erection of the municipal electric light plant, the authorities of the town of Hazlehurst were vested with power to authorize the contractor to trim them to any degree that might be found necessary, and, in the absence of any charge of malice, willful wrong, or oppression, their action in this regard will not be reviewed by the courts. It is evident that the trial judge misinterpreted the prior decisions of this court bearing on the question of municipal control over its

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highways, and hence committed error in refusing the instruction bearing on this point asked by appellant.

As this is decisive of the case upon its merits we do not consider or decide the other contention presented.

Reversed and remanded.

ISHAM C. LEVY v. WILLIAM C. ROYSTON ET UX.

1. FRAUDULENT CONVEYANCE. *Void description. Equity between grantor and grantee. Creditor's right. Cancellation.*

A creditor's bill to set aside a fraudulent conveyance made by his debtor should not be dismissed, or relief narrowed, because the land is so defectively described in the deed as to render it void upon its face, since such a deed creates in the grantee as against the grantor an equity in the land intended to be conveyed which the creditor is entitled to have cancelled.

2. SAME. *Second deed. Procedure. Right to assail.*

Where, in a creditor's suit to cancel for fraud a deed made by his debtor, the court after hearing the cause announced its conclusion that the deed was void because of a defective description of the land, and, before final decree entered, the debtor executed a second deed perfecting the description, the cause should, on complainant's application, be remanded to the rules and complainant allowed to file a supplemental bill assailing the second deed.

FROM the chancery court of Benton county.

HON. JULIAN C. WILSON, Chancellor.

Levy, appellant, was complainant in the court below; Royston and wife, appellees, were defendants there. From a decree, largely in defendant's favor, the complainant appealed to the supreme court. The facts are fully stated in the opinion of the court.

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Brief for appellant.

W. A. McDonald, and *Mayes & Longstreet,* for appellant.

We respectfully submit that the learned chancellor erred. The court below applied the strict rule which formerly obtained in actions to remove clouds, and which was practically to the effect that if the alleged conveyance which constituted the cloud would not have required proof in an action at law to defeat it, but was void on its face, that it could not operate to hinder and delay creditors in the enforcement of legal rights, or amount to a cloud on title.

In other words, the old rule was that if the instrument was void on its face it required no cancellation, but that cancellation could only be made on a conveyance regular on its face, but which should be void for some matter not apparent in the conveyance itself, and which could be made matter of proof *aliunde.*

This was an improper view of this instrument. It is true that where an instrument is void for a patent ambiguity, it is not effectual without correction, but under the decisions of this court, and under the decisions of the majority of common law courts, this deed operated to convey from Royston to his wife such right and equity in the land as practically to give her an interest and an estate therein. The vendee, holding under defective deed, which insufficiently described the property, is the equitable owner of the premises. 12 L. R. A., 178.

The deed was certainly reformable. As between the husband and the wife this was a good conveyance. There was no such inherent fraud in the transaction between them as would have debarred the wife from enforcing the equity of reformation. *Cummins* v. *Steele,* 54 Miss., 647; *Koevnig* v. *Schmitz,* 71 Iowa, 175.

Section 4226, Code 1892, in relation to fraudulent conveyances, is very much broader and more comprehensive in its terms than former statutes, than the English statute, and broader than the general rule as announced by text writers.

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Brief for appellees.

By this section (4226) any act, or attempt at an act, to the execution of which there has been a substantial effort, the natural effect of which would be, if consummated, to hinder, delay and defraud creditors, will be held to have that effect and to be voidable.

In the second place, the chancellor erred in refusing on the application of complainant to remand the cause to rules and to grant complainant the right to amend his bill so as to assail the validity of the second conveyance from Royston to his wife, made on the 17th day of October, 1903.

C. Lee Crum, for appellees.

The allegations in the bill of complaint and the proof show that the deed which Royston attempted to make to his wife was absolutely void, for want of certainty in the description in the land, both the township and the range being omitted, with no other words to in any way identify it. This confessed and proven defect is a patent ambiguity, and renders the deed absolutely void. *Swazie* v. *McCrossin,* 13 Smed. & M., 320; *Holmes* v. *Evans,* 44 Miss., 247; *Bowers* v. *Andrews,* 52 Miss., 596.

Since the deed was void on its face for a patent ambiguity and transferred no interest in the land attempted to be conveyed, it necessarily follows that there was no conveyance, fraudulent or otherwise, and hence no jurisdiction for the court below.

The court below did not err in refusing to allow the complainant to amend his bill so as to set up the deed that Royston executed to his wife pending the trial of this case. She was a party to the suit and had full notice of all that was being done in the case at bar, and the last conveyance could not defeat the object of this suit. Besides this, the suit must be determined by the state of facts that existed at the time of its institution.

"The right of amendment is established by the statutes in each state, but there are certain principles which underlie these

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statutes and control their operation. No amendment which is unfair to the opposite party will be allowed. It follows from this that no new cause of action can be added . . . for an amendment." 1 Am. & Eng. Ency. Law, 547; 1 Ency. Pl. & Pr., 472.

Argued orally by *James C. Longstreet,* for appellant.

CALHOON, J., delivered the opinion of the court.

Levy filed a creditors' bill against Royston and wife, alleging a conveyance from Royston to his wife to be fraudulent, and praying its cancellation, and subjection of the land conveyed to his debt due from Royston, except so much of it as may be selected or allotted as a homestead. The bill describes the land alleged to be so fraudulently conveyed as the "south half of section 1 and the southeast quarter of section 2, in township 4, of range 1 west," and charges that the conveyance of this land from the husband to the wife is void on its face because of invalid description of the land, but that it would deter purchasers from bidding at its sale This conveyance is made an exhibit to the bill, and it recites its consideration as "one dollar and for the love that I have for my wife, Mahalie Royston," and its description of the property conveyed is "southeast quarter of (2) two, south half of one (1), said land being situated in Benton county, Mississippi," omitting sections, township, and range. The joint answer of the defendants denies the debt and sets up usury, and denies that the conveyance is void or fraudulent, or without consideration. Proof was taken, and, in the afternoon of a day of the session of the court, the chancellor announced his decision orally for the preparation of a decree to the effect that complainant recover his debt, after purging it of usury, but denying the cancellation of the conveyance on the sole ground that it was void on its face for invalid description. The idea was that it was nothing, and therefore no obstacle to levy and sale under execution. In this attitude of the case the court ad-

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journed until the next morning; but, pending this adjournment, Royston executed another conveyance to his wife, reciting a consideration of $800 borrowed from her, and describing the land properly. This conveyance was filed for record that morning at 6 o'clock A.M., before the court opened and before the decree was signed. Thereupon Levy moved the court to remand the cause to rules, with leave to him to amend his pleadings so as to attack this new transfer. The court overruled this motion, and entered decree in accordance with the oral announcement of the afternoon before.

We think it was error not to allow the amendment. But, aside from this, we do not think that, because of the invalidity of the description in the original conveyance, therefore it should not have been canceled, if the facts showed it was executed with a fraudulent purpose to defeat creditors of their right to resort to the land sought to be conveyed. As between Royston and his wife, it was a valid paper, in so far as it conferred upon her, and those claiming under her, the right in equity to have it reformed to conform to the actual intention prompting its execution. This equity existing, the record of it might well deter purchasers from bidding, and buying a lawsuit. The doctrine of voidness for uncertainty, as applied to actions of ejectment, does not apply to this proceeding by a creditor. He has a right to a cancellation of this equity.

Reversed and remanded.

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Brief for appellant.

JOHN T. McCLOUD, USE OF SAMUEL A. CARLY, *v.* JAMES F. McCULLERS.

ATTACHMENT. *Garnishment. Change of venue. Code* 1892, § 2147.

A defendant in attachment cannot avail of the right to a change of venue given by Code 1892, § 2147, to garnishees who reside out of the county and whose answers are controverted.

FROM the circuit court of, first district, Coahoma county.

HON. SAMUEL C. COOK, Judge.

McCloud, appellant, suing for the use of Carly, was plaintiff, and McCullers, appellee, was defendant, in the court below. From a judgment in defendant's favor, the plaintiff appealed to the supreme court. The opinion states the facts.

J. W. Cutrer, for appellant.

In the present case two of the garnishees resided in the first district of Coahoma county, and it does not lie in the mouth of the defendant below, appellee here, to contend that his legal rights were violated because these garnishees were garnisheed in the second district, for the judgment by default in the court of Landers, justice of the peace, was conclusive against defendant so far as concerned the question of jurisdiction, but the defendant carried his appeal to the circuit court of the second district of Coahoma county, and there applied for and was granted a change of venue to the first district, solely on the ground that two of the garnishees resided in the first district.

Upon what principle the court of the second district acted in granting this transfer it is difficult to perceive. The only persons who had a right to object to the jurisdiction of the court to which the appeal was taken from the judgment of the justice of the peace, were the garnishees themselves. Section 2147, Code 1892.

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The venue may be changed "on his (the garnishee's) application." What warrant can be found in this section for the contention that the defendant has the right, on his own motion, to transfer the cause to the district wherein the garnishee resides? Surely nothing can be clearer than that this provision was intended for the protection of garnishees and not as a device whereby debtors can hinder and delay attaching creditors.

D. A. Scott, for appellee.

The only complaint which can possibly be made in this court by the defendant must necessarily be based upon the supposed error of the lower court in transferring the case from the second to the first judicial district of Coahoma county. Under the facts, however, it appears manifest that the action of the court below in this regard was entirely correct for the reason that the circuit court of the second district had no jurisdiction whatever in the premises.

In many particulars the case at bar is identical with the case of *Nations* v. *Lovejoy,* 80 Miss., 401 (s. c., 77 Miss., 36), and under the decision of this court in the said last mentioned case it is insisted the case at bar should be affirmed.

Argued orally by *J. W. Cutrer,* for appellant.

Calhoon, J., delivered the opinion of the majority of the court.

An affidavit for an attachment for debt, on the ground that McCullers had removed or was about to remove his property out of the state, and that he had converted or was about to convert his property into money or evidences of debt, with intent to place it beyond the reach of his creditors, was made before a justice of the peace, who had his office in Clarksdale, in the second judicial district of Coahoma county. This was accompanied by a suggestion of the names of garnishees. The writ, pursuant to this affidavit, was duly served in Clarksdale on all the

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three named garnishees, one of whom, living in that second district, answered, denying any debt to McCullers, and his answer was not disputed. The other garnishees, also duly served in Clarksdale, in the second district, were residents of the first district; but each answered, acknowledging that he owed McCullers, in a sum specified, and there was no contravention of the answer of either, and neither asked any change of venue to the district of his residence. The justice of the peace gave judgment by default against McCullers, who had been duly served with process in Washington county, where he lived, and he gave bond for appeal, and the justice of the peace sent the record up to the circuit court of the second district of Coahoma county. This appeal bond did not show to which circuit court district of Coahoma county the appeal was taken, but the circuit court allowed McCullers to amend it by showing in it that it was to the first district, and then sustained his motion to "transfer this cause" to the first district on the ground that the garnishees were all along residents of that district. This motion was sustained more than a year after the appeal papers were filed, and after issue joined on traverse of the affidavit, and after depositions taken and other proceedings had, and in the circuit court of the first district plaintiff had judgment that his attachment was rightfully sued out, but McCullers won on the debt issue.

There can be and is no controversy that the justice of the peace had jurisdiction to try the case, and that the circuit court for the second district had it on the appeal, unless it was defeated by the fact that the garnishees who were duly served as garnishees in the second district were in truth residents of the first district, as shown by agreement to be the fact. *Baum* v. *Burns,* 66 Miss., 124 (5 So. Rep., 697). We know of no law giving the right to a defendant in attachment for debt to object to the venue because the garnishees might do so on their own account. Here they do not object to the venue, and there is no contest of their answers admitting debt to defendant. They themselves could not have the venue changed unless contest of

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Statement of the case.

their answer was made. Code 1892, § 2147; *Christian* v. *O'Neal,* 46 Miss., 669, applied this principle to defendants not objecting who were served with process. We think it was error to transfer the cause from the second to the first district.

Reversed and remanded.

WHITFIELD, C. J., delivered the following opinion, concurring in the conclusion.

We all agree that the order for the transfer is supported by no statute and is utterly void. I think that disposes of the case, and prefer standing on that alone.

WIRT ADAMS, STATE REVENUE AGENT, *v.* MISSISSIPPI LUMBER COMPANY.

TAXATION. *Constitution* 1890, *sec.* 112. *Privilege tax. Lumber business. Exemption. Non-exporter. Interstate commerce. Constitution of the United States, art.* 1, *sec.* 8, *clause* 3. *Laws* 1900, *p.* 43, *ch.* 43, *sec.* 8.

The eighth section of the act of March 9, 1900 (Laws 1900, p. 43, ch. 43, sec. 8), purporting to impose a privilege tax "on each land timber mill company," etc., but excepting therefrom sawmill operators who do not ship timber or lumber out of the state, is unconstitutional, in that it violates:

(*a*) Constitution 1890, sec. 112, declaring that taxation shall be uniform and equal; and

(*b*) Constitution of the United States, art. 1, sec. 8, par. 3, giving congress power to regulate commerce between the states, since it seeks to impose a tax on interstate commerce.

FROM the circuit court of Clarke county.
HON. JAMES H. NEVILLE, Judge.

Adams, state revenue agent, appellant, an officer of the state, authorized (Laws 1894, p. 29), to sue for and recover delin-

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Brief for appellee.

quent taxes of past years, was the plaintiff, and the Lumber Company, appellee, was defendant in the court below. From a judgment in defendant's favor, the plaintiff appealed to the supreme court. The facts are stated in the opinion of the court.

J. M. Jayne, Jr., and *Arthur Fridge,* for appellant.

"The subjects of taxation may be classified at the discretion of the legislature, and if all of the same class are liable alike there is no violation of the equality and uniformity required by the constitution." *Vicksburg Bank* v. *Worrell,* 67 Miss., 47. It is well settled that, if provisions of this character apply at all to privilege taxes imposed upon business pursuits and professions, all that is necessary in levying them is that all persons pursuing the same occupation shall be taxed the same amount, or in the same ratio. *Holberg* v. *Macon,* 55 Miss., 112.

Is a tax on property that may be shipped out of the state for sale an attempt at interference with interstate commerce? This question was definitely presented to the supreme court of the United States in *Nathan* v. *Louisiana,* 8 How. (U. S.), 73. It was there held that a privilege tax imposed on a dealer in foreign exchange was no attempt at regulation of interstate commerce.

The case of *Rothemek* v. *Mayerle,* 9 L. R. A., 366, involved the construction of a state stautute of almost the same nature as the one in the case at bar. In that case the court, basing its opinion on such adjudications of the United States supreme court as *Brown* v. *Houston,* 8 Wall., 123; *Welton* v. *Missouri,* 91 U. S., 275; *Brown* v. *Maryland,* 12 Wheat., 425; *The Daniel Ball,* 77 U. S., 557, in no uncertain words held that a tax on goods while remaining a part of the general mass of state property (whether they were to be shipped out of the state or not) in no way involved an attempt at regulating interstate commerce.

Samuel H. Terral, for appellee.

Section 3, ch. 43, Laws 1900, is repugnant to sec. 112 of

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the constitution of the state of Mississippi, which provides that "taxation shall be uniform and equal throughout the state," and is therefore void. Bouvier defines taxation as "the process of taxing or imposing a tax;" as "a pecuniary burden for the support of the government." This definition clearly includes a privilege tax where it is imposed for the purposes of revenue. Is the tax in question a revenue tax or a police regulation? As there is nothing inherently dangerous or pernicious in the occupation taxed, as it requires no police regulation—save that incident to all occupations—and as no inquiry whatever is made into the moral fitness or qualifications of those applying for the privilege, but the license is sold to all applying indiscriminately, clearly it is not a police regulation. It is, however, imposed for the purpose of raising revenue, and some of the most law-abiding citizens in the state are engaged in the business sought to be taxed. It is then a revenue tax. In *Mississippi Mills* v. *Cook*, 56 Miss., 40, it was held that "there is to be no discrimination between property of the same class, and it shall not be competent to levy one rate upon country lands and another upon city lands, or one rate upon horses of one breed and another upon horses of a different breed." In *Adams* v. *Bank*, 75 Miss., 701, this doctrine of uniformity and equality was held to include all forms of *ad valorem* taxation, whether state, county or municipal. Why, then, discriminate in occupation taxes of the same class? Why not carry the doctrine a step further, and to its logical conclusion, and make the taxation of privileges uniform and equal? The act in question is not uniform and equal in that it does not apply to all of the same class of sawmill operators, discriminating arbitrarily against those who buy timber without buying the land, and who ship the timber or lumber out of the state and favoring those who buy timber without buying the land, and who do not ship timber or lumber out of the state, even though the sawmill operators have equal capital employed in the business, and have mills of the same capacity. Not being uniform and equal,

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Brief for appellee.

the act is void. Cooley on Taxation, 3d ed., pp. 259, 260, 1100; Judson on Taxation, secs. 456, 459; *North Carolina* v. *Moore*, 22 L. R. A., 472; *New Hampshire* v. *Pennoyer*, 5 L. R. A., 709; *Bank* v. *Worrell*, 67 Miss., 47.

Whatever the intent, the practical effect of the act in question is to impose a tax of five cents per acre on timber bought without buying the land, and which is shipped out of the state. It is therefore a discrimination against nonresidents requiring them to pay more for lumber or timber coming from this state than is required of residents, as the sawmill operator will inevitably make the "consumer pay the tax." Such an act invites retaliation, and it would be just as permissible for Alabama or Pennsylvania to impose a tax on shippers of coal or iron, the shippers buying the coal or iron without buying the land, and shipping it out of the state as it is for Mississippi to impose the tax in question. Almost every state has an abundance of some article of commerce not found in all states alike, one of Mississippi's being lumber, and if each were permitted to enact laws like the one in question, great confusion, prejudice and ill-will would result, and interstate commerce would soon become restricted, if not altogether prohibited. Each state would indeed be a law unto itself, in so far as articles shipped from the state are concerned. As the tax is not due until the business begins, the business of buying the timber without buying the land and shipping it out of the state, and as the moment the timber or lumber leaves the state, or the moment that it is placed aboard the cars for its final destination out of the state, it become interstate commerce, it follows that it is a tax, an occupation tax, if you will, upon interstate commerce. The right to tax carries the right to confiscate or prohibit, and if five cents per acre can be thus imposed, then so can $100 per acre, or any amount within the discretion of the legislature, or the business can be prohibited altogether. If the legislature cannot tax articles that are to be brought within the state, or the occupation of bringing goods within the state, neither can it tax

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articles that are shipped out of the state, nor the occupation of shipping goods out of the state. One is the corollary of the other, and both are a tax on interstate commerce. Hence, the act in question violates article 1, sec. 8, clause 3 of the constitution of the United States, which provides that "congress shall have power to regulate commerce . . . among the several states," and is therefore void. *Crutcher* v. *Kentucky*, 141 U. S., 47 (35 L. Ed., 649); *Lying* v. *Michigan*, 135 U. S., 161 (L. Ed., 151); *Leloup* v. *Mobile*, 127 U. S., 640 (L. Ed., 311); *Walling* v. *Michigan*, 116 U. S., 446; *Brennan* v. *Titusville*, 153 U. S., 287 (L. Ed., 719); *Idaho* v. *Evans*, 7 L. R. A., 288; *Ames* v. *People*, 55 Pac. Rep., 725; *Startford* v. *Council*, 20 So. Rep., 127; *Mfg. Gas Co.* v. *Nat. Gas Co.*, 53 L. R. A., 134; Colley Con. Lim., 7 ed., 153.

CALHOON, J., delivered the opinion of the court.

Appellant declined to answer or plead further on a judgment sustaining a demurrer to his declaration, and the whole question, on his appeal from that action, is as to the validity or invalidity of sec. 8, ch. 43, p. 44, Laws 1900, which act is as follows:

"Section 8. On each land timber mill company, or corporation, or individual in each county, who buys timber without buying the land, for 500 acres, or less, $25. Same, for 1,000 acres, or more than 500 acres, $50, and so on at the rate of $25 on each 500 acres in each county so purchased; *provided*, that this does not apply to sawmill operators who do not ship timber or lumber out of the state."

The declaration seeks to recover from the Mississippi Lumber Company this privilege tax. It was demurred to, the demurrer sustained, and the revenue agent declined to amend or plead further, and appeals to this court.

The proviso makes the section void. It violates sec. 112 of our constitution, declaring that "taxation shall be uniform and equal throughout the state." It is a discrimination between

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subjects of property ownership of the same class. *Adams* v. *Kuykendall,* 83 Miss., 571 (35 So. Rep., 830). There is no inherent difference between timber for home sale and timber for export, and there can be no valid classification between the two. *Adams* v. *Kuykendall,* 83 Miss., 371 (s. c., 35 So. Rep., 830); *Mississippi Mills* v. *Cook,* 56 Miss., 40; *Adams* v. *Bank,* 75 Miss., 701 (23 So. Rep., 395); *State* v. *Moore* (N. C.), 18 S. E., 342 (22 L. R. A., 472); *State* v. *Pennoyer* (N. H.), Atl., 878 (5 L. R. A., 709); *Ballard* v. *Mississippi Cotton Oil Co.,* 81 Miss., 507 (34 So. Rep., 533; 62 L. R. A., 407). Very many other cases might be cited.

Moreover, this section is practically a tax on interstate commerce. The right of any citizen of any state to take himself or his property out of or into any state cannot be taken away, nor can it be hampered by discriminative taxation in any degree whatsoever. This right is universal, subject, only, to regulations in the exercise of the police power to conserve health or morals, and even these must not be arbitrarily exercised to work discrimination. Tiedeman, State and Fed. Control, vol. 4, pp. 490, 491; Id., vol. 2, pp. 1032-1038; *State* v. *Moore,* 113 N. C., 704 (18 S. E., 342; 22 L. R. A., 472); *State* v. *Wagener,* 69 Minn., 207 (72 N. W., 67; 38 L. R. A., 677; 65 Am. St. Rep., 565); *Welton* v. *Missouri,* 91 U. S., 275 (23 L. Ed., 347); *State v. Bengsch,* 170 Mo., 81 (70 S.W., 710); *State* v. *Mitchell,* 97 Me., 66 (54 Atl., 887; 94 Am. St. Rep., 481); *State* v. *Montgomery* (Me.), 47 Atl., 165 (80 Am. St. Rep., 389, 390); 2 Tucker on the Const., 528-534, 552.

The foregoing authorities will be found to be based, some on state constitutional uniformity clauses, and some on the interstate commerce clause of the constitution of the United States, and some on the fourteenth amendment of this constitution, forbidding the abridgment of the privileges or immunities of citizens of the United States, or the denial of the equal protection of the laws. The bar can examine them at leisure.

The only decision we find at all infringing on the proposi-

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Statement of the case.

tion of the right of free egress and regress of property out of and into a state is that of *Geer* v. *Connecticut*, 161 U. S., 519 (16 Sup. Ct., 600; 40 L. Ed., 793). In that decision Justices Brewer and Peckham took no part, and Justices Field and Harlan dissented. However, the opinion there distinctly recognizes the principles we have announced, but makes a differentiation as to game birds killed and sought to be transported to another state, against a law forbidding their transportation, in a learned dissertation on the proprietorship by the state, in its sovereignty, of all animals *ferae naturae* for the benefit of all the people as a food supply.

The chief justice concurs in the conclusion, but prefers to put it solely on the ground that the effect of the legislation is to deny to appellee the equal protection of the laws.

Affirmed.

WILLIAM W. DOWNING v. HINDS COUNTY.

POSTAGE. *Chancery clerk. Board of supervisors. Code* 1892, § 296.

It is the duty of the board of supervisors, under Code 1892, § 296, requiring it to furnish the county officers with necessary stationery, furniture and "all other necessary articles," to furnish the necessary postage to be used in the official business of the clerk of the chancery court.

FROM the circuit court of, first district, Hinds county.

HON. D. M. MILLER, Judge.

Downing, appellant, was plaintiff and Hinds county, appellee, defendant in the court below. From a judgment in defendant's favor the plaintiff appealed to the supreme court. The facts are stated in the opinion of the court.

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Brief for appellant.

C. M. Williamson, for appellant.

Section 296 provides that the board of supervisors shall provide for "supplying all county offices with necessary record books, stationery, seals, presses, iron safes, tables, chairs, furniture and all other necessary articles, etc., and on the order of the circuit court or the chancery court shall allow all sums expended for supplying the offices and court rooms with all such necessary articles.

Section 926 of the code provides that the circuit and chancery courts shall make allowances to the clerks thereof of all needful sums for supplying the offices and courts with necessary stationery, furniture, etc., such allowance to be certified to the board of supervisors when made. The simple question in this case is, do these statutes authorize the payment of bills for postage stamps used in the chancery clerk's office in the conduct of the public business? Or must the clerk pay it out of his private funds?

We insist that the law authorizes and requires postage stamps to be furnished. Surely if letter heads and envelopes come under the head of stationery, postage stamps, without which the envelopes and letter heads would be useless, would be included. Are not stamped envelopes stationery? A postage stamp is "an official mark or stamp attached to or embossed on an envelope to pay the charges for the carriage of an enclosed letter through the mails."

Should the clerk buy stamped envelopes with the letter heads and other stationery and present the bill under the head of stationery, would the board of supervisors not only be authorized, but required, to pay it? We think so, unquestionably. What is the distinction when the clerk buys the stamps separately, and then attaches them to the envelopes? The construction given to the statute by the board of supervisors and the lower court requires the clerk to pay the largest part of the stationery bill for carrying on his official correspondence.

The court below held that the stamps were not stationery,

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Brief for appellee.

because not mentioned in the statute, and not mentioned in any definition of the term. Under this ruling ink stands would not be included; paper fasteners and many other articles not mentioned, but all of which are necessary articles, and are always sold as stationery by stationers, and all supplied to the clerk, would not be included.

The courts have allowed the purchase of typewriters for copying on record books under the terms "necessary stationery, and other necessary articles for the office."

But if the term stationery does not embrace postage stamps, the legislature used at the end of the enumeration a general clause that does cover postage stamps, to wit:

"And all other necessary articles." That stamps are necessary articles is not disputed.

As stamps cannot be speculated in, they are furnished to the state officers as they are needed. When we look to all of the statutes on the subject and remember the necessity for the use of postage stamps in conducting the official business of county offices, the conclusion cannot be escaped that the statutes properly construed require them to be supplied with stationery and other necessary articles by the board of supervisors, and that the allowance for the postage stamps should be made.

Benjamin H. Wells, for appellee.

The board of supervisors recognize the fact that postage stamps are necessary to be used by the clerk in the transaction of the public business of his office, and if the law as written permits them to make such an allowance, they will very cheerfully do so; but in view of the fact that where postage stamps were intended to be allowed as in § 4264, providing for the office expenses of the county superintendent of education, the word postage was used, and in all of the other sections it was omitted to be used, the board did not feel authorized to pay the account.

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Opinion of the court.

CALHOON, J., delivered the opinion of the court.

This is a friendly controversy between the chancery clerk and the board of supervisors of Hinds county. The clerk wants the actual money he has paid out for postage in his official business as clerk refunded to him. The board wants to pay him, if it lawfully can. Both are conscientious; the one wanting not to exact what he is not entitled to, and the other not wanting to appropriate public money without warrant of law. We think the terms "stationery," "and all other necessary articles," in § 296 of the code of 1892, embrace necessary postage used in the public business. The word "stationery" itself is indeterminate, and is to be interpreted in the light of custom and reason. It is hardly conceivable that the lawmaking power designed all officers, great and small, to pay, out of their salaries, the postage on state or county official business. What would become of the state superintendent of education, governor, secretary of state, land commissioner, supreme court clerk, and others? Uniform usage in the state, tiding over all the legislative sessions, furnishes a practical construction of the statute which cannot be overlooked. So far as we know, corporations, banks, partnerships and individual business enterprises include outlays for postage under the head of "stationery." But that word is re-enforced in the statute before us by the words "and all other necessary articles," and certainly postage stamps are indispensably necessary. The solitary instance where the word "postage" is used is in Code 1892, § 4264, in the chapter on county superintendent of public education, and there the words "and all other necessary articles" do not appear, and we cannot, because of the use of the word in this section, overturn the settled usage of the state.

Reversed and remanded.

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Statement of the case.

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BENJAMIN E. BRISTER ET AL., USE, ETC., v. ILLINOIS CENTRAL RAILROAD COMPANY.

1. INSTRUCTIONS. *Erroneous. When not harmless. Conflicting evidence.*

Erroneous instructions, calculated to mislead the jury, are not harmless where the testimony would support a verdict for either party.

2. SAME. *Railroads. Fires. Contributory negligence. Insurance.*

In a suit brought by the owner of property destroyed by fire for the use of insurance companies, subrogated to the owner's rights, against a railroad company for negligently causing the fire, where the testimony would support a verdict for either party, instructions for the defendant are erroneous:

(*a*) Which authorize a finding on only a part of the evidence, ignoring the balance; or

(*b*) Which assume the negligence of the owner, the evidence being conflicting on the subject; or

(*c*) Which, propounding the plaintiff's contributory negligence as a defense, omit from the conception of it the element of proximate cause; or

(*d*) Which, propounding said defense, fail to predicate the owner's contributory negligence of knowledge that there was danger to be guarded against.

3. SAME.

A railroad company which sets out a fire on its right of way so near buildings as to endanger them is negligent, if it fail to guard the fire for the entire time such danger exists.

FROM the circuit court of Lincoln county.

HON. ROBERT POWELL, Judge.

Brister and others, appellants, doing business under the name Brister & Co., who sued for the use of several fire insurance companies, were the plaintiffs in the court below; the railroad company, appellee, was defendant there. From a judgment in defendant's favor the plaintiffs appealed to the supreme court.

Brister and others, plaintiffs, owned a large saw and plan-

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Statement of the case.

ing mill, situated on the west side of the tracks of the Illinois Central Railroad, at Bogue Chitto. The mill was about fifty feet from the main line, and there were a spur track and some switch tracks next to the mill. On November 5, 1900, this plant was destroyed by fire. Brister & Co. had several fire policies in different insurance companies, aggregating $13,000. The insurance companies paid Brister & Co. the amount of their several policies, and took an assignment of plaintiffs' claim against the railroad company for damages. These several insurance companies were the usees in this suit against the Illinois Central Railroad Company to recover the amount of the damage by fire to the mill plant, it being charged that the fire was caused by the negligence of the employes of said railroad company. The evidence for plaintiff was that the railroad company's section foreman on November 5, 1900, had a number of laborers at work clearing off the tracks and right of way in front of the mill, and that some timbers and trash were piled up and set on fire by these laborers; that there were three fires started near the mill early in the morning, which burned all day. One was started about twenty feet from the corner of the mill where the fire started which burned the mill. It was shown that the fires were burning, and the wind was blowing over the fires towards the mill about eight o'clock at night, and there were no lights about the mill, and no other fire except those on the railroad. The fire occurred between ten and eleven o'clock that night. It was also shown that it was a very dry time, and that the contents of the mill were very inflammable. The fires were examined by an employe of defendant about six o'clock that evening, and they had burned down, and there was, in the opinion of this employe, no danger from them unless there was wind, and the section foreman examined the fires at six o'clock, and in his opinion there was no danger from them at that hour. Brister & Co. had a night watchman, who was on duty at the time of the fire. No one knew how the fire started. The evidence for the defendant contradicted some of the material parts

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Brief for appellants.

of the plaintiffs' testimony. The opinion of the court contains a further statement of the facts.

Green & Green, for appellants.

Conceding for the present that contributory negligence is properly predicable of the facts in this case; that the same is properly pleaded, and is based upon evidence, still, would the jury be warranted in finding a verdict for the defendant as they are here instructed to do "if Brister & Co., by their negligence, in any way contributed to the burning of the property?" Does this accurately describe contributory negligence? Suppose Brister & Co. had been guilty of negligence which contributed to the burning, by improperly building or in some other way, which did not do so as a proximate but as a remote cause. Under this instruction the idea of proximate cause is totally excluded, eliminated; the jury are left to look to any act of negligence, or what they may be pleased to deem negligence, however remote, in the chain of causes and visit its effect upon these appellants. 7 Am. & Eng. Ency. Law (2d ed.), 371; *Railroad Co.* v. *Mason,* 51 Miss., 234.

If the sole immediate cause of the injury was the defendant's negligence the plaintiff can recover, notwithstanding previous negligence of his own. *The Vicksburg* v. *Jackson R. R. Co.,* 242, 487; *Kerwhacker* v. *The Cleveland & Cincinnati R. R. Co.,* 3 Ohio St., 172; *Pittsburg, etc., R. R. Co.* v. *Karnes,* 13 Ind., 87; *Richmond* v. *Sacramento, etc., R. R. Co.,* 18 Cal., 351; *Stucke* v. *Mil. & Miss. R. R. Co.,* 9 Wis., 202; *Isbell* v. *New York, etc., R. R. Co.,* 27 Conn., 393; *Railroad Co.* v. *Patton,* 31 Miss., 193; *Crow* v. *Vermont, etc., R. R. Co.,* 24 Vermont, 494; *Thompson* v. *Duncan,* 67 Ala., 336; *Orleans* v. *Perry,* 24 Neb., 835.

The instruction is unsound in that it reads, "If they (the jury) believe from the evidence in the case, or any part thereof, that Brister & Co., by their negligence, in any way contributed," etc.

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Brief for appellee.

If we read the record aright it does not appear to be an admitted fact in any sense that Brister & Co. were negligent in any regard; on the contrary the evidence shows that such was not the case; that no negligence could be imputed to them, and were it otherwise the duty rested on the jury to find it so upon conflicts in the evidence. *Railway Co.* v. *Phillips,* 70 Miss., 18; *French* v. *Sale,* 63 Miss., 386; *Dunlap* v. *Hearn,* 37 Miss., 471; *Myrick* v. *Wells,* 52 Miss., 149; *McMurtry* v. *Railway Co.,* 67 Miss., 601; *Hickman* v. *Railroad Co.,* 66 Miss., 154; *Meyer* v. *King,* 72 Miss., 9; *Bank* v. *Murdock,* 62 Mo., 73.

The case of *A. & V. Ry. Co.* v. *Aetna Ins. Co.,* 82 Miss., 770, is conclusive on this point, because it denies that contributory negligence is ordinarily predicable of this class of cases.

The fifth instruction for the defendant was most damaging to appellants, and the effect was in part due to an error arising from the failure to insert therein a qualifying phrase, thus: "And that the danger, if any arose subsequent to the inspection, and that the employes of Brister & Co., or the night watchman, who were on duty for Brister & Co., were charged with the duty of extinguishing fires in the service of Brister & Co., and that such employes knew thereof, and so knowing there and then" might have, by the exercise of reasonable care, prevented the burning of Brister & Co.'s property, and failed to do so.

Mayes & Longstreet and *J. M. Dickinson,* for appellee.

If the facts of this case submitted a close question for solution, or if the record did not demonstrate that the verdict rendered by the jury below was the only one the jury could have rightfully returned, on the whole evidence of the case, then it might be insisted that some consideration should be given to mere verbal criticisms of the instructions granted by the court.

But we respectfully submit to the court that an examination

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of this record will amply show that the case presented was one which would clearly have justified a peremptory instruction in favor of the company.

The testimony for plaintiff does not raise the presumption that the railroad company, through any act of itself or of its agents, caused the burning of the shed or the mill, nor even leave on the mind the impression that the action of the railroad employes in burning off the trash and debris on the right of way was likely to have been the cause of the fire in the mill.

Giving plaintiffs' evidence full credit for all that it proves, or tends to prove, the conclusion is unavoidable that they have failed to make out their case and to answer the burden of proof on them, and that for this reason we are justified in the assertion that the facts of the case would have warranted a peremptory instruction for the defendant.

Of course we recognize the fact that the origin of a fire may be shown by circumstantial evidence, and that when the question of negligence of a railroad company is in question, in this connection, that even any slight circumstance may be offered in evidence. The rule, however, requires that these circumstances, in the aggregate, shall show not a mere possibility that the negligence of the railroad company caused the fire, but must tend to show a reasonable probability that the action of the railroad company was the cause of the origin of the fire.

This proposition finds a fair and forcible statement in the case of *Finkleston* v. *Chicago R. R. Co.*, 94 Wis., 270.

The instructions in this case, few in number and not positive in terms, could have had litttle to do with producing this result. Taken as a whole, they fairly state the law, and the inaccuracies in them, if any, could not have had effect in the face of the overwhelming preponderance of the evidence in favor of the defendant company.

The verdict was manifestly right, and our court has repeatedly held that a verdict manifestly right will not be disturbed because of erroneous instructions. *Wilson* v. *Kolheim*, 46 Miss.,

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Opinion of the court.

346; *Storm* v. *Grecn,* 51 Miss., 103; *Vance* v. *State,* 62 Miss., 137.

WHITFIELD, C. J., delivered the opinion of the court.

There was a verdict in the court below for defendant. The errors insisted on by the plaintiffs (appellants) are chiefly with respect to the instructions given for the defendant. Learned counsel for the defendant insist very earnestly that, though there may be errors in the said instructions, nevertheless the testimony so overwhelmingly shows no liability on the part of defendant that the judgment should be affirmed notwithstanding such errors, if any. We have carefully gone through the entire evidence in the case, and find ourselves unable to concur with counsel for appellee in their view of the force and effect of the testimony as warranting a verdict for defendant. We deem it only necessary to say in respect to the evidence that it is such as not to warrant the interfering with a verdict, whether rendered for the plaintiffs or the defendant, in the absence of errors of law.

Turning to the instructions given to the defendant, we find instruction No. 3, which is in the following words:

"The court instructs the jury for the defendant that the plaintiffs in this case cannot recover unless Brister & Co., under the evidence, could recover; and if they believe from the evidence in the case, or any part thereof, that Brister & Co., by their negligence, in any way contributed to the burning of the property, then they will find for the defendant."

This instruction is fatally erroneous. The jury should have found their verdict on the entire evidence, not upon "any part thereof." It is too obvious for comment that an instruction that tells a jury that they may find their verdict on any part of the testimony is manifestly wrong. The second error in this instruction is that it assumes that Brister & Co. were negligent. The jury are not told if they believe from the evidence that Brister & Co. were guilty of negligence, etc.,

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but the language used is this: "If they believe from the evidence in the case, or any part thereof, that Brister & Co. by their negligence," etc. This is a clear assumption that they were negligent. The third respect in which the instruction is erroneous is in telling the jury that they should find for the defendant if they believed the plaintiffs "in any way" contributed to the burning of the property. This is not the correct announcement of the law with respect to contributory negligence. This court has declared in *Railroad Company* v. *Mason,* 51 Miss., 234, that, "to prevent a recovery, the plaintiffs' negligence must proximately contribute to the injury," and that, "if the sole immediate cause of the injury was the defendant's negligence, the plaintiff can recover, notwithstanding previous negligence of his own." This principle is supported by many authorities cited in brief of learned counsel for appellants. In *Railroad Co.* v. *Patton,* 31 Miss., 193, 66 Am. Dec., 552, the court say: "It may therefore be considered as settled law that, though there be negligence or fault on the part of the plaintiff remotely connected with the injury, yet if, at the time the injury was done, it might have been avoided by the exercise of reasonable care, prudence and skill on the part of defendant, the plaintiff may maintain his action for the injury." It would be useless to add to the many authorities directly in point collated in brief of counsel. The principle is that the negligence of plaintiff, to constitute contributory negligence, must be such negligence as directly and proximately contributed to the infliction of the injury. It is perfectly obvious, therefore, that this instruction is in three respects fatally erroneous.

The fifth instruction for the defendant is as follows:

"The court instructs the jury, for the defendant, that if they believe from the evidence that the employes of the defendant inspected the fire after six o'clock P.M. of the day preceding the fire, and that at this time there reasonably appeared to be no danger therefrom, and that there was no danger therefrom, and that the danger, if any, arose subsequently

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to the inspection, and that the employes of Brister & Co., or the night watchman, might have, by the exercise of reasonable care, prevented the burning of Brister & Co.'s property, then the jury will find for the defendant."

This instruction limits the care to be taken by the railroad company in order to prevent fire to the time of the inspection. This is error. There was a continuing duty on the part of the defendant railroad company to take proper precautions to prevent the fire (the railroad itself having set out the fires on its right of way near the mill property) as long as it allowed the fire to remain there. It should have been diligent to prevent the fire, not only up to the inspection, but throughout the continuance of the fires which it had so set out. The latter part of the instruction is also erroneous in not predicating the existence of contributory negligence on the part of Brister & Co. upon their knowledge that there was any danger to be guarded against. The instruction assumes that there was no danger for which the defendant was liable after the inspection, which is not the law. The danger might have arisen later, against which it was the duty of the defendant to guard; and it then proceeds to charge the plaintiffs with contributory negligence, without laying down any qualifications as to the necessity of knowledge on the part of the plaintiffs of any danger to be guarded against.

It is impossible to sustain this verdict on the face of these charges.

The judgment is reversed and the cause remanded.

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Brief for appellant.

PATRICK BOYLE, GUARDIAN, v. WILLIAM T. GRIFFIN, GUARDIAN.

1. PARENT AND CHILD. *Domicile.*

The domicile of a father is the domicile of his infant children.

2. GUARDIANS. *Foreign appointment. Right to infants' funds. Code* 1892, §§ 2211, 1925.

A foreign guardian is not required, under Code 1892, § 2211, empowering him to sue for and receive property of his ward upon the same terms as foreign executors and administrators are authorized to sue for and recover property belonging to a decedent's estate, to file his letters of guardianship, etc., in this state before receiving a check payable to himself as guardian, although, under Code 1892, § 1925, a foreign executor or administrator cannot sue for or recover the property of the estate until he has filed a certified copy of the record of his appointment in the proper chancery court in this state.

FROM the chancery court of Tallahatchie county.

HON. CAREY C. MOODEY, Chancellor.

Griffin, guardian, appellee, was complainant, and Boyle, guardian, appellant, was defendant in the court below. The suit was an attachment in chancery against a nonresident defendant. From a decree largely in complainant's favor the defendant appealed to the supreme court. The facts are fully stated in the opinion of the court.

Finlay & Finlay, for appellant.

The evidence establishes beyond dispute that Tryon changed his domicil from Tutwiler, Miss., to Memphis, Tenn., before his death. Tryon's will commences thus: "I, Andrew E. Tryon, LATE of Tutwiler, NOW of Memphis, Tennessee." McCoy and Hoffman, the witnesses to the will, say that each paragraph of the will was read over to Tryon and after hearing each, Tryon expressed his approval, so that the statement of

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residence is not merely perfunctory and formal, but deliberate and intentional.

As residence is altogether a matter of choice and volition, the clear and explicit statement of the will is final on the question of Tryon's domicil, which, however, is abundantly proved otherwise.

There was no property in Mississippi belonging to the two children, Alga and Elmer Tryon, which the appellee could administer as guardian. If the policy or benefit certificate was their estate, it was undoubtedly located in Tennessee, where Tryon had his domicil at the time of his death. If the debt or obligation due on the benefit certificate was their estate, then its *locus* was in Nebraska, where the debtor corporation had its *situs*. In either event the appellee could not draw the fund into Mississippi by attachment. *I. C. R. R. Co.* v. *Smith*, 70 Miss., 344; *Bush* v. *Nance*, 61 Miss., 237; *Bucy* v. *K. C. M. & B. R. R. Co.*, 22 So. Rep. (Miss.), 296.

"The domicil of a legitimate or legitimated minor is, during the lifetime of his father, the same as, and changes with, the domicil of his father." Dicey on Conflict of Laws, p. 120.

"Thirdly, minors are generally deemed incapable, *proprio marte*, of changing their domicil during their minority; and, therefore, they retain the domicil of their parents; and if the parents change their domicil, that of the infant children follows it; and if the father dies, his last domicil is that of the infant children." Story on Conflict of Laws, sec. 46.

In *Wells* v. *Andrews*, 60 Miss., 373, where children were unlawfully removed from Tennessee to Mississippi, the court said: "They (the children) were domiciled in Tennessee, and the jurisdiction of the courts of that state over them and their estate was not destroyed by their removal, by their relatives, to Mississippi."

In such cases there is no difference between unlawful removal and unlawful detention. The law, in effect, is that the

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Brief for appellant.

unauthorized interference with a child's residence does not affect the place of his domicil.

The subject-matter of this litigation is solely a check payable to appellant. This check was attached as the property of appellant. Boyle was not indebted to Griffin, either individually or as guardian. The only judgment which the court can render in an attachment suit when the complainant fails to prove that the principal defendant is indebted to him is to dismiss the suit and discharge the attachment.

Appellant complied with the laws of Mississippi, and, as testamentary guardian, is to be preferred over appellee, who was appointed on his own application.

The record of the appointment and qualification of Boyle, as guardian, together with the certificate of the clerk of the court, as required in said act, properly authenticated under the act of congress, was filed in the office of the clerk of the chancery court of the second district of Tallahatchie county on September 18, 1902. It is true that this suit was commenced a short while prior to that date, but Boyle was not suing, but being sued, and it seems clear that the provisions of the statute have been strictly and literally complied with. He was not required to file the record, etc., before he was sued, but before he brings a suit or receives without suit property of his wards.

Furthermore, if it had been necessary for him to file the record before the suit was brought against him, that is, if the provision of the statute applied in this case, he could perfect his right by a subsequent compliance with the statute. *Grist* v. *Forehand,* 36 Miss., 69.

It is argued that our position is a collateral attack on the judgment appointing Griffin guardian in this state, and that under the decision in *Ames* v. *Williams,* 72 Miss., 760, the judgment of the chancery court cannot be attacked collaterally. We concede that if Boyle had been a party to the proceeding in which the appellee was appointed guardian, he could not

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collaterally attack the appointment. But being a stranger to that proceeding, he can attack the grant of the letters in this proceeding.

"It must not, however, be understood that *all* strangers are entitled to impeach a judgment. It is only those strangers who, if the judgment were given full credit and effect, would be prejudiced in regard to some pre-existing right, that are permitted to impeach the judgment. Being neither parties to the action, nor entitled to manage the cause nor appeal from the judgment, they are by law allowed to impeach it whenever it is attempted to be enforced against them." Freeman on Judgments (4th ed.), vol. 2, sec. 335.

"An exception to the rule (against collateral attack) is stated in favor of strangers to the record whose pre-existing rights are affected, and who had no knowledge or notice of the proceedings; and such persons, having had no opportunity to reverse erroneous judgments, are accorded the privilege of calling them in question in collateral proceedings." Ency. Pl. Pr., vol. 12, p. 202.

"But this rule (against collateral attack) applies only to parties and their privies. It does not apply to such third persons or strangers to the record as would be prejudiced in regard to some pre-existing right if the judgment were given full credit and effect." *Eureka Iron and Steel Works* v. *Bresnahan,* 66 Mich., 489.

"The rule that a judgment of a court of competent jurisdiction is conclusive until reversed or in some manner set aside and annulled, and that it cannot be collaterally attacked by evidence tending to show that it was irregularly or improperly obtained, only applies to parties and privies to the judgment who may take proceedings for its reversal, and in no sense extends to strangers." *Atkinson* v. *Allen,* 12 Vt., 619.

To hold that a stranger to a judgment could not attack it in a collateral proceeding would be to deprive him of all redress whatever. *Goladar* v. *Gates,* 20 Mo., 236.

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Brief for appellee.

This rule is universal. *Sidensparker* v. *Sidensparker,* 52 Me., 479 (488); *Safford* v. *Weare,* 142 Mass., 231; *Vose* v. *Martin,* 4 Cush. (Mass.), 31; *Downs* v. *Fuller,* 2 Met. (Mass.), 135 (138); *Luflin* v. *Field,* 6 Met. (Mass.), 287 (289); *Gilbert* v. *Duncan,* 65 Me., 469 (475); *Caswell* v. *Caswell,* 28 Me., 232 (237); *Fall River* v. *Riley,* 140 Mass., 488; *Leonard* v. *Bryant,* 11 Met. (Mass.), 370 (373); *Hunter* v. *Cleveland Coop. Stove Co.,* 31 Minn., 505; *Ogle* v. *Baker,* 137 Pa. St., 378 (384); *Ingals* v. *Brooks,* 29 Vt., 398 (401); *Boisse* v. *Dickson,* 31 La. Ann., 741.

Griffin, the appellee, suppressed facts which would have prevented the issuance of his letters. He cannot claim that he is entitled to any priority over the appellant because his letters were issued before Boyle filed the copy of his appointment with the chancery court clerk, for, if he had disclosed what he knew, the application would have shown on its face that it was premature. He cannot take advantage of his own wrong.

James G. McGowan, for appellee.

The chancery court adjudicated that the wards' residence was at Water Valley, Mississippi, upon issuing the letters, and the act of the clerk was confirmed by the chancellor in term time after the filing of this suit, and before the hearing or taking of proof in this case, without exception or objection by Boyle, which if he had done successfully would have ended this litigation. So the question of their residence is *res adjudicata.*

Under our constitution the court had jurisdiction of this case, but if there could be any question at all as to this, one of the defendants without collusion paid the money into court, and asked that court to settle the question at issue.

As to collateral attack: Appellee objected to Boyle's testimony on the ground that his appointment could not be attacked collaterally in any suit by him as guardian in this state. Relying on *Ames* v. *Williams,* 72 Miss., 760, followed strictly in *Gillespie* v. *Hauenstein,* 72 Miss., 838.

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Opinion of the court.

Notice is unnecessary in the appointment of guardians in Mississippi, and counsel are in error when they say that three months had not expired before appellee's appointment. He was not appointed until ninety-two days after the death of Tryon, besides that question, under *Ames* v. *Williams*, cannot be raised except in the court of Griffin's appointment.

Argued orally by *Percy Finlay*, for appellant, and *J. E. McGowan*, for appellee.

CARHOON, J., delivered the opinion of the court.

At one time there lived in this state a gentleman named Andrew E. Tryon. He was a chronic invalid. He had, at the time this record is concerned, with him his three little motherless children, the survivors of a family of five of them. He seems to have been in life, and up to the hour of his death, absolutely devoted to them, and all the time possessed with a fervent wish that they should be kept together and grow up with fraternal love and affection. Disease had for some years made work for their support impossible to him. Struggle for a livelihood had to cease, but from no fault of his own. Finally, all he had was exhausted, and he could not furnish bread for the mouths of his little ones, and they had no nest. He was destitute, and destitute with a heart filled with every generous impulse of paternal devotion to his offspring. Longing to help them, he was powerless, chained to a rock by pitiless disease, but with great and fetterless affection. A situation more distressing to a sensitive heart it is not easy to conceive. When everything had been exhausted in maintenance, and starvation was snarling at his brood, good people of Tutwiler came to their aid in such way as they could, and charity combated the wolf. In this, his dire extremity, dominated as he was by the hope of keeping his children together, he made application to the Orphans' Home, a noble charity of the Methodist Episcopal Church, established at Water Valley, Miss., to receive them

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in its generous shelter for the distressed, providing in the application that his relinquishment of their custody should be "until such time as I may be able to care for them." This was dated March 25, 1902, and shows that he still hoped to recover his health and support them. This was not acted on, so far as this record shows, but on April 9, 1902, the extremity being great, a worthy clergyman of that church made and signed Mr. Tryon's name to another application to the same institution for their admission, but without Mr. Tryon's knowledge, consent or ratification. The action of this minister was from the most benevolent motives, and above criticism, because he knew of the desire of the father that the children should not be separated, and that the father was in no condition for consultation, and that immediate action was absolutely necessary. He assumed and was warranted in assuming, that, in the emergency then existing, the father could not but approve. This worthy Christian man, then, took the three children, Ada, aged 11, Algie, aged 7, and Elmer, aged 5 years, to the institution, which accepted Algie and Elmer, but refused Ada because of her ill health, and the benevolent clergyman took her back to Tutwiler, where she was cared for by charity until sent to Memphis to another Christian charitable institution known as "St. Peter's Orphan Asylum." This was at her father's wish, so that she might be near him, he being then in St. Joseph's Hospital there, under treatment, and with hope of recovery, and, without doubt, adopting Memphis as his permanent home. He had also written the Orphans' Home at Water Valley for Algie and Elmer to be sent, and with money for their fare to Memphis furnished by friends, but they were not sent, and are still at the Orphans' Home. These three children had nothing on earth except a policy of insurance in the Woodmen of the World for $2,000, the assessments and dues on which were kept up in Mr. Tryon's poverty by a big-souled man named H. B. Fitch. On May 23, 1902, Mr. Tryon made his will in Memphis, Tenn., giving the guardianship of the persons and

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Opinion of the court.

estate of his three children to Mr. Patrick Boyle of that city, and died five days thereafter, on May 28, 1902, with Ada only with him, and Mr. Boyle duly probated the will in Memphis on June 5, 1902, on which day letters of guardianship were duly issued to him there. The camp of the Woodmen of the World, of which Mr. Tryon was a member, was at Tutwiler, Miss., and, according to custom, that order sent the check for the $2,000 there for delivery to, and on receipt of, Patrick Boyle, guardian, and, while this check was in the hands of the proper officer of the Tutwiler camp, Mr. Griffin, who had been informed of Mr. Boyle's appointment, and had seen a copy of his letters of guardianship a month or more before, and without any notice to Boyle of his purpose, himself took out letters of guardianship of Algie and Elmer in Tallahatchie county, Miss., on August 27, 1902, less than three months (Code 1892, § 1509) from Tryon's death (Code 1892, § 2185), and on the next day filed his bill for attachment in chancery, and the court decreed that he have two-thirds of the check and Boyle one-third of it, and Boyle appeals.

Very clearly, from the evidence, Tryon's domicil was Memphis, Tenn., when he made his will, and he had a perfect right to name the guardian for his children, and he did so. His domicil being in Memphis, that also was the domicil of his children in the view of the law, and the guardian was under no legal obligation to file copies of his letters of guardianship, etc., in Mississippi before receiving a check payable to him. If he were, he did so after he had notice of Mr. Griffin's bill, which was his first knowledge that Griffin had taken out letters. *Grist* v. *Forehand,* 36 Miss., 70; Code 1892, §§ 1925, 2211. It is sufficient for Boyle, the foreign testamentary guardian, in defense of a suit for a check payable to him, to produce his appointment as testamentary guardian. Boyle was entitled to the whole check and the custody of the children.

Reversed and decree here dismissing the bill.

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Statement of the case.

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AUSTIN PULPUS v. STATE OF MISSISSIPPI.

CRIMINAL LAW. *Murder. Evidence.*

Where, on a prosecution for murder, there was no evidence of a conspiracy between the defendant and others, who were present at the killing, it was error to admit testimony, over defendant's objection:

(*a*) That defendant and such other persons were at the place where deceased was working on the day of the homicide but before it occurred;

(*b*) That such other persons who were with the defendant at the time of the killing were armed with sticks which were deadly weapons, and that some of them participated in the homicide; and

(*c*) That defendant and another were at a certain store on the day before the killing, when defendant called for pistol cartridges, without permitting defendant to prove by that other how he came to be with defendant.

FROM the circuit court of, first district, Chickasaw county. HON. EUGENE O. SYKES, Judge.

Pulpus, appellant, was indicted jointly with Alexander Pulpus and Arthur Orr for the murder of one George Anderson. A severance was granted and appellant was separately tried, convicted and sentenced to be hanged, from which conviction and sentence he appealed to the supreme court—the first appeal. The supreme court reversed the conviction and awarded a new trial. See *Pulpus* v. *State,* 82 Miss., 548.

Upon the remand of the case to the court below appellant was again separately tried and convicted of murder and a second time condemned to death. From this second conviction he took the present appeal.

On the day before the killing, Austin Pulpus, Isaiah Gillespie, and others were ditching for Joseph Randall. George Anderson, deceased, went to where they were en-

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Brief for appellant.

gaged, and got into a difficulty with Austin Pulpus, appellant, and struck him over the head with a spade. On the day of the homicide, Alexander Pulpus, Austin Pulpus, Arthur Randall, Theodore Wilson, and James Wilson went to Joseph Randall's house, where George Anderson was at work, and got Randall to go with them to measure up the ditches that had been completed. Each of them had rabbit sticks. These parties afterwards came back by Randall's house, and Austin Pulpus and George Anderson got into a difficulty, and Anderson was killed by Pulpus. On the trial the state was allowed to prove, over defendant's objection, that appellant and Isaiah Gillespie were at Lundy Smith's store the day before the killing, and appellant asked for some pistol cartridges. Appellant tried to have Gillespie explain how and why he happened to be at Smith's store with him, but was not allowed to do so. The state also proved, over defendant's objection, that on the morning of the homicide his companions were armed with sticks, and that these sticks were deadly weapons, and were capable of inflicting great bodily harm, and that some of them participated in the homicide.

Gilleylen & Leftwich, and *T. J. Buchanan,* for appellant.

That defendant is not guilty of murder under the facts of this case, was fully decided by this court on the former appeal. That is, *res adjudicata,* for the state's evidence is substantially the same as it was at the former trial and the defendant's much stronger.

The state's persistent and ineradicable theory, totally unsupported by the competent evidence both at the former trial and this one, was that there was a deep-dyed and malignant conspiracy between some negro boys, Austin Pulpus, Alexander Pulpus, Arthur Orr, Theodore Wilson and James Wilson to kill George Anderson. This court found on the former record that there was no conspiracy, but with that ruling overturning the very foundation of the case as a case of murder, the court

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Brief for appellee.

below erroneously held several pieces of evidence to be competent.

The court below erred in allowing the district attorney, over defendant's objection, to ask Joseph Randall about Isaiah Gillespie, Alexander Pulpus, Arthur Orr, Jesse Wilson, Theodore Wilson and James Wilson being at Joseph Randall's house with defendant on the morning of the day of the difficulty and before the difficulty occurred, and about their having rabbit sticks with them, and as to what rabbit sticks were, and as to their standing around and talking to George Anderson, deceased.

The court below erred in allowing the district attorney to ask Lundy Smith about Isaiah Gillespie being with Austin Pulpus at his store the evening before the difficulty to buy cartridges, and in refusing to allow defendant to prove by Isaiah Gillespie when he came on the stand why he went there and when and where he and Austin Pulpus had been.

The court below erred in allowing the district attorney to prove by Bettie Randall, over defendant's objection, that Alexander Pulpus and Arthur Orr threw rabbit sticks at George Anderson, deceased, and that those same parties had been at Joseph Randall's that morning before the killing, there being no evidence of a conspiracy.

J. N. Flowers, Assistant Attorney General, for appellee.

If the record now before the court had been presented on the former appeal there would have been no reversal. The court below on the last trial carefully regarded all the suggestions of this court, and avoided all the mistakes made on the first trial. Without the aid of counsel's suggestions it could not be discovered that a conspiracy was thought of by the presiding judge, or that the admission of any testimony was influenced by any such theory.

Counsel call attention to two instances. They say, first, that the witness who was with defendant at Lundy Smith's

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Brief for appellee.

store was not permitted to tell why he was there with him at the time defendant was trying to buy cartridges. But this witness was not on trial, the defendant was not responsible for his acts; it was not attempted to be shown that he had anything to do with the killing; it was not attempted to bind defendant by anything this witness did. It was impossible to conceive how the exclusion of his explanation of how he came to be there could have prejudiced defendant's case. It would have been admissible only upon the very theory which counsel say has no place in this case. It was competent to ask if he was there in order that he might then be asked if the defendant tried to buy cartridges.

In the second place, they say the state was permitted to show that the accused was at Joseph Randall's house on the morning of the day of the killing and these other negro boys were with him, and that they had rabbit sticks in their hands. How could this affect the verdict when it was not attempted to be shown that any of these parties at that time tried to hurt George Anderson, or that any of them at any time took any part in the difficulty? One who is out on a hunt for evidence of a conspiracy theory would never condemn this testimony. If it was not wrong to show that defendant and deceased met on the day of the killing a few hours before the tragedy, was it wrong to show who was present at the meeting? The defendant himself would want this testimony if the state did not offer it—he would offer it to show that he had other opportunities to kill deceased with the pistol he had in his pocket if he had been looking for him, and this, too, at a time when his friends were around him armed with dangerous weapons. It was perhaps incompetent to show what the men who were with him had in their hands, but the testimony, if worth anything at all was worth as much to the defendant as it was to the state.

Argued orally by *T. J. Buchanan,* and *G. J. Leftwich,* for appellant.

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Opinion of the court.

TRULY, J., delivered the opinion of the court.

Upon the former appeal of this case, it was reversed for the granting of erroneous instructions on the part of the state; but it was held by the court, and the opinion so states, that there was no proof of any conspiracy, and that the evidence showed conclusively that the meeting of the various parties on the morning of the homicide was wholly accidental. In the light of that opinion, it was error to admit testimony showing that the defendant and other named individuals were at Randall's house on the day of the homicide, and before it occurred. It was error to permit the introduction of testimony on the part of the state showing that the companions of defendant on the occasion in question were armed with sticks, and to admit proof that such sticks were deadly weapons, or were capable of inflicting great bodily harm. It was error to admit testimony that others than the defendant and the deceased participated in the homicide. It was error to permit the witness Smith to testify as to why defendant's companion was at his store on the day before the homicide, and not permit Gillespie to explain how it happened that he was with the defendant on the occasion in question. If, as decided on the former appeal, there was no conspiracy, it follows that the testimony referred to was incompetent and without probative force, and could only serve the purpose of prejudicing the minds of the jury by inducing them to believe that the deceased met his death in pursuance of a preconcerted plan concocted by defendant and others. For this reason, the court should have followed the intimation of the former opinion herein, and restricted the testimony to the immediate scene of the killing, and to such acts and conduct of the combatants engaged therein as might shed light thereon.

The assignment of error predicated of the alleged action of the court in drawing the special venire is not presented with sufficient definiteness to enable us to pass on it. And as the other

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Syllabus.

assignments may not arise on another trial, we do not deem it necessary to decide them at this time.

Reversed and remanded.

JOHN HARVEY THOMPSON, TRUSTEE, ETC., *v.* FIRST NATIONAL BANK OF JACKSON.

1. BANKRUPTCY. *Trustee. Suits by. Fraudulent conveyance.*

   A trustee in bankruptcy, as the representative of the creditors of the estate, may maintain a suit in equity to set aside fraudulent deeds made by the bankrupt, and subject the property conveyed to his debts.

2. SAME. *Partnership. Dissolution. Consent of creditors.*

   Where, on the dissolution of a partnership, the retiring partner and all the creditors consenting thereto, the title to firm property was transferred to the partner who was to continue the business, and three months thereafter the continuing partner made disposition thereof and was adjudged a bankrupt, the right of his trustee in bankruptcy to sue for the property so disposed of by him cannot be defeated on the claim that the property was partnership property.

3. SAME. *Mere preference. Bankrupt act of* 1898.

   Under the bankrupt act of 1898, sec. 60, subd. "a," of which defines a preference within the contemplation of the law as a transfer of any of the bankrupt's property, the effect of which will be to enable any creditor to obtain a greater percentage of his debt than other creditors of the same class, and sec. 3 of the same, which provides that a transfer by a person, while insolvent, of any portion of his property with intent to prefer a creditor over other creditors, shall be an act of bankruptcy, a mere preference does not amount to an act of bankruptcy, there must be also an intent to prefer.

4. SAME. *Trustee's suit. Recovery of property. Necessary proof. Defendant's knowledge.*

   Under Bankr. Act, July 1, 1898, sec. 57, subd. "g," providing that the claims of creditors who have received preferences shall

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Brief for appellant.

not be allowed unless the creditors surrender their preferences, and section 60, subd. "b," declaring that if a bankrupt has given a preference within four months, etc., and the person receiving it shall have reasonable cause to believe that it was intended to give a preference, the trustee may recover the property on proof that the transfer was intended as a preference by the bankrupt, and also that the receiving creditor had reasonable cause to believe that it was so intended.

5. SAME. *Sufficiency of pleading.*

Where the bill by a trustee in bankruptcy to recover property transferred by the bankrupt alleged that the conveyance was made for the purpose of preferring the transferee, and that the transferee had knowledge of all the facts at the time of the preference, it stated a cause of action against the transferee.

6. SAME. *Demurrer erroneously sustained. No affirmance on facts.*

Where, in a suit by a trustee in bankruptcy to set aside a transfer of property made by the bankrupt, a demurrer was erroneously sustained to the bill and the same dismissed after evidence had been taken, the court on appeal will not affirm the judgment on the theory that the decision was correct, although made on the wrong grounds, there having been no decision on the evidence, but only on the pleadings.

FROM the chancery court of, first district, Hinds county.

HON. HENRY C. CONN, Chancellor.

Thompson, appellant, was complainant and the First National Bank, appellee, was defendant in the court below. From a decree sustaining a demurrer to the bill of complaint as amended the complainant appealed to the supreme court. The opinion of the court fully states the facts.

Watkins & Easterling, and *Brame & Brame,* for appellant.

Was the property which Barman transferred to McApine & Levy, by which transfer the First National Bank received a preference, partnership property, or was it the property of Barman?

When Suttle, as shown under the allegations of the bill, sold out to Barman, he disposed of his entire interest in the assets

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of the partnership, both legal and equitable; and Barman owned the same in fee simple free from any and all claims of Suttle; and when Barman sold said property, it was his property, not the property of Barman & Suttle. Part of it was the property which the firm of Barman & Suttle had owned, but at the date of the alleged preferential transfer, the title to the property was in Barman in fee simple; and it was not partnership property, but was individual property of Barman; and therefore the trustee in this case is not endeavoring to administer upon the estate of the partnership, but is endeavoring to recover from a preferred creditor property which Barman transferred to that creditor. Collier on Bankruptcy (3d ed.), 70. *In re Walter P. Long, et al.,* 7 Benedict (District Court Reports), 149; *In re Collier-Taylor & Company,* 12 National Bankruptcy Register, 266; *In re Wm. Downing,* 33 National Bankruptcy Register, 748; *Robb* v. *Mudge,* 14 Gray, 534; *Amsink* v. *Bean,* 22 Wall., 393.

Counsel for appellee argue that the First National Bank was a partnership creditor, that at the dissolution of the firm of Barman & Suttle it had a lien on the partnership assets for the satisfaction of its debt.

If there is anything which the courts of this country have established beyond any question of doubt, it is that partnership creditors have no lien. The courts of this state and of other states, with rare exceptions, hold that the doctrine of the lien of partnership creditors is merely what the courts call a rule of administration, that is to say, when the partners themselves have made no disposition of the partnership assets, or if they have made a fraudulent disposition of the partnership assets, and administration of the assets are before a court of chancery, then a court of chancery will pay first the partnership creditors out of the partnership assets and *vice versâ.* 22 Am. & Eng. Ency. Law (2d ed.), 192; *Schmidlapp* v. *Currie,* 55 Miss., 597; *Roach* v. *Brannon,* 57 Miss., 490; *Hanover National Bank* v. *Klein,* 64 Miss., 149.

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Brief for appellee.

The bill shows that Barman & Suttle were solvent; that they both desired to dissolve the partnership, they both desired and did impress upon the property the character of individual property, and that Suttle relinquished all his claim to said property, both legal and equitable, and in doing so, they were exercising a right of disposition which is inherent in the members of all partnerships; and it furthermore appears that this dissolution was not made for the purpose of defrauding partnership creditors, but the evident purpose of it and intention of the dissolution was, that Barman could take the assets and pay off the partnership creditors, which he had a perfect right to do. No creditor of Barman & Suttle could object to this arrangement; and if they had objected, the time to have objected was then, not to stand there and see Barman contract individual debts and make additions to the property on his individual credit.

Counsel for appellee say this is not a case of equitable jurisdiction. The bill shows that the First National Bank got a part of the property, we do not know how much. We know that it is liable to this appellant for the property received by it. We ask for discovery and we ask for an accounting in order that we may ascertain what part of the property it received.

It is no defense to a suit brought by a trustee of Barman to say that some other party who may be liable for these debts is not shown in the face of the bill to be insolvent.

Green & Green, for appellee.

The rights of firm creditors cannot be changed by any agreement made by the partner. *Norman* v. *Jackson Fertilizer Co.,* 79 Miss., 753; *Swan* v. *Smith,* 57 Miss., 553; *Ranson* v. *Taylor,* 30 Ohio St., 389; *Hardware Co.* v. *Wells,* 90 Tex., 110.

The trustee of an individual partner has no right to avoid firm transactions, even though they may be preferences as to firm creditors. *In re Sanderlin,* 109 Fed., 859; *McNair* v. *McIntire,* 113 Fed.; *Amsinck* v. *Bean,* 22 Wall., 404; *In re*

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Brief for appellee.

Rodding, 6 Biss., 377; *In re Holbrook,* 2 Low; *In re Shephard,* 3 Ben., 352; *In re Mercur,* 116 Fed., 655; *Telegraph Co.* v. *Institution,* 116 Fed., 662.

A partnership is an entity, the creditors of which have the right to the assets which cannot be affected by the act of the individual partners. *Bank* v. *Durfey,* 72 Miss., 975; *Bank* v. *Fargason,* 79 Miss., 64; *George* v. *Lumber Co.,* 33 So. Rep., 497. In equity partnership creditors have a lien. Bankrupt Act 1898, sec. 5, A. F.; *In re Mosier,* 112 Fed., 139. When property is appropriated to the discharge of a valid lien thereon no preference is created as against the unsecured creditors. *Hallock* v. *Tritck,* 13 N. B. R., 293; *Sawyer* v. *Turpin,* 17 N. B. R., 271.

Preferential transfers of firm property can only be avoided by the firm trustee (Collier on Bankruptcy, 308), and a dissolution of a firm does not affect a creditor's rights. Bankrupt Act 1898, sec. 5A; *In re Hirsch,* 97 Fed., 573; *In re Meyer,* 98 Fed., 976. There is no averment that the firm and J. S. Suttle were insolvent, and to transform a transfer into a preference this is a condition precedent. *Vacaro* v. *Bank,* 103 Fed., 441; *In re Blair,* 99 Fed., 76; *In re Meyer,* 98 Fed., 976.

Barman is not entitled to a discharge from the firm debts. *In re Meyers,* 97 Fed., 411; s.c., 97 Fed., 757; *In re Russell,* 97 Fed., 32; *In re Meyers,* 98 Fed., 976; *In re Hale* 107 Fed., 432.

Upon the whole case and all the proof taken, the judgment is clearly correct, and should be affirmed, although the demurrer to the second amended bill was improperly sustained. *Railroad Co.* v. *Adams,* 32 So. Rep., 944.

Argued orally by *W. H. Watkins* and *L. Brame,* for appellant, and by *Marcellus Green,* and *Garner W. Green,* for appellee.

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Opinion of the court.

MAYES, Special Judge, delivered the opinion of the court.*

This case comes to this court by appeal from a decree sustaining a demurrer to a second amended bill and dismissing the same.

The said amended bill averred in substance as follows: That Barman & Suttle were partners, carrying on a stable business; that Suttle was only a nominal partner; that on July 1, 1901, the firm owed $5,500, including a large debt to the First National Bank; that the bank was well acquainted with every detail of the business of the firm; that about such day Suttle retired from the partnership, disposing of his entire interest in the assets to Barman, who assumed all the outstanding indebtedness of the firm, including the debt owing to the First National Bank; that the firm's creditors acquiesced in this arrangement; that Barman continued the business in his own name until about the 1st of October, in the usual course of business, acquiring property and disposing of the same; that about the 1st of October, being then insolvent and owing about $5,500, including the old firm liabilities and other debts incurred by himself after the dissolution, and being pressed by the bank and other creditors, and his stock then being worth about $3,000, he sold the entire stock to McAlpin & Rutherford, who undertook to pay, and did pay, the debt of about $2,200 then due to the bank, and a few other small debts, leaving unpaid about $3,000 of indebtedness, mostly due to the creditors of the former firm of Barman & Suttle; that when this transfer was made the bank well knew that Barman was insolvent, and knew that such transfer operated as a preference in its favor over the other creditors of Barman, successor to Barman & Suttle, and that in making this collection it was obtaining a preference over the other creditors of Barman and of the former firm; that on December 24, 1901, a petition for in-

*Judge Calhoon recused himself in this case, and Edward Mayes, Esq., a member of the supreme court bar, was appointed special judge and presided in his place.

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Opinion of the court.

voluntary bankruptcy was filed against Barman, on which such proceedings were had that he was duly adjudicated, and complainant was duly elected and qualified as trustee in bankruptcy of Barman's estate; that such transfer by Barman was made for the purpose of preferring the bank over the remaining creditors, and that the bank "was in knowledge of all the facts at the time of said preference." The amended bill on such statements prayed that the bank be required to repay the money received by it.

This bill was demurred to for want of equity; but that point is disposed of by *Wall* v. *Cox,* 101 Fed., 403 (41 C. C. A., 408), in which case it is held that such a bill does lie, and we accede to that view.

It is contended by the appellee that the trustee cannot maintain this action, because, as is claimed, the assets were partnership assets, while the complainant is trustee of only the individual estate of Barman. Various cases are cited to support this proposition, especially *In re Sanderlin* (D. C.), 109 Fed., 857. We do not think these cases applicable. In all of them the transfers declared to be not assailable by the trustee were transfers of firm property made by the firm. But the instant case is not in that class; for here the firm had been dissolved about three months before the transfer complained of was made, and by consent of the retiring partner the entire title and ownership of the property had been for so long a time vested in Barman, in which the creditors acquiesced, and the transfer was made by Barman, solely, as of his individual property. We hold that the trustee can recover as the individual trustee, if other conditions to recovery are met. The case of *Amsinck* v. *Bean,* 22 Wall., 404 (22 L. ed., 801), contains a clear intimation that such is the law where a dissolution occurs, and the title is vested in the bankrupted partner, prior to the filing of the petition.

Does the bill state a cause of action? is the remaining question; and this question requires us to consider what averments

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are needed under the bankruptcy law, and what averments are made in the bill. The bankrupt law, for some purposes, clearly distinguishes between a transfer of property, on the one hand, the effect of which is to enable a creditor to obtain a greater percentage of his debt than other creditors of the same class, and a transfer, on the other hand, made and received with the intent to give and receive such a preference. Section 60, subd. "a," defines a preference, within contemplation of the bankrupt law, as being "a transfer of any of his property, and the effect of the enforcement of such . . . transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." Act July 1, 1898 (c. 541, 30 Stat., 562, U. S. Comp. St., 1901, p. 3445). Thus the question of whether a given transfer is or is not a preference is brought to the test of its effect, and not to the test of its intent. But the law does not make illegal every preference so defined, even when made within four months. For section 3, in defining acts of bankruptcy, provides that they "shall consist of his having . . . transferred, while insolvent, any portion of his property to one or more of his creditors, with intent to prefer such creditors over his other creditors" (30 Stat., 546 [U. S. Comp. St., 1901, p. 3422]), and so the intent is made a necessary element in the act of bankruptcy. So, also, sec. 57, subd. "g," provides that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences" (30 Stat. 560 [U. S. Comp. St., 1901, p. 3443]); while sec. 60, subd. "b," declares that "if a bankrupt shall have given a preference within four months, etc., and the person receiving it . . . shall have reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee and he may recover the property or its value from said person." Thus the provision of the statute seems to be that a mere preference in effect or result shall not be an act of bankruptcy, but there must be also an intent to prefer; and also that, while the

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Opinion of the court.

bare fact of a preference in effect received within the four months shall bar a creditor receiving the same from proving any balance due, and participating with the other creditors in dividends, unless he shall surrender what he got, yet still he is entitled to his election; and before a trustee can recover a preference payment received he must allege and prove both that the payment was intended by the debtor as a preference, and also that the receiving creditor had reasonable cause to believe that it was so intended. Speaking of the foregoing provisions, it was said in *Columbus Electric Co.* v. *Worden,* 99 Fed., 400 (39 C. C. A., 582), that: "It is apparent from these provisions of the law that not all preferences by an insolvent debtor may be avoided. The congress has seen proper to provide that the trustee in bankruptcy may recover preferences in the event only that the creditor had reasonable cause to believe that a preference was intended." In *Pirie* v. *Chicago Title & Trust Co.,* 182 U. S., 438 (21 Sup Ct., 906; 45 L. ed., 1171), the condition of the law is clearly so stated. The court said: "But if the person receiving the preference did not have cause to believe it was intended, what then? It follows that, the condition beng absent, its effect will be absent. In other words, he may keep the property transferred to him, whether it be a complete or partial discharge of his debt." Now, nearly all of the averments of the amended bill are directed to the effect of the transfer assailed, as constituting a preference. The only statement which can be considered as charging an unlawful intent and knowledge is the following: "Said conveyance was made for the purpose of preferring the First National Bank, . . . [and] the said First National Bank . . . received a preference of $2,200 over the other creditors, and was in knowledge of all the facts at the time of said preference." Although this statement of the bill is not in the statutory terms, we think it is sufficient to present the necessary issues for decision. Construing that language to include a charge that the transfer complained of was made by Barman

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Syllabus.

with intent to give the bank a preference over other creditors of the same class, and that the bank had reasonable cause to believe it was given with such intent, we hold that the amended bill did state a cause of action, and was not demurrable.

The claim that the judgment below should be affirmed under the rule applied in *Railroad Co.* v. *Adams,* 81 Miss., 90 (32 So. Rep., 937), is not sound. In that case the chancellor had tried the case on final hearing on the proofs, and we held that, although his decision may have been made on the wrong grounds, yet, looking to all the proofs, his decree was correct, and we affirmed it; but here there has never been any decision on the proofs, but only a judgment about the sufficiency of the pleading.

Cause reversed, and remanded with instructions to the court below to proceed with the same in accordance with this opinion.

WILSON T. STEEN, ET AL. *v.* WILLIAM R. KIRKPATRICK, ET AL.

1. WITNESSES. *Estates of decedents. Evidence. Code* 1892, § 1740. *Inheritance.*

The testimony of the heirs of the husband to a contract between him and his wife, made shortly before and in contemplation of their marriage, to the effect that the surviving husband or wife should take only a life estate in the property of the other, is not incompetent against the estate of the wife under Code 1892, § 1740, providing that no one shall testify to establish his own claim against the estate of a decedent which originated in the lifetime of the deceased, since in such case the question is one of inheritance and not a claim which originated in the lifetime of the wife.

2. STATUTE OF FRAUDS. *Code* 1892, § 4225, *par. b. Consideration of marriage. Contemplation of marriage.*

An agreement, made in contemplation of marriage after the contract to marry has become binding, is not an agreement in con-

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Brief for appellants.

sideration of marriage within the meaning of the statute of frauds (Code 1892, § 4225, par. b), providing that an action shall not be brought whereby to charge a defendant upon any oral agreement made upon consideration of marriage.

3. SAME. *Code* 1892, § 4225, *par. c. Sale of lands.*

A prenuptial parol contract as to the rights of the parties about to be married in the real estate of each other is not enforcible, under Code 1892, § 4225, par. c, providing that an action shall not be brought whereby to charge a defendant upon any oral contract for the sale of lands or the making of any lease thereof for a longer term than one year.

4. SAME. *Code* 1892, § 4225, *par. d. Agreement not to be performed within one year.*

A contract which may or may not be performed in one year is not within the statute of frauds (Code 1892, § 4225, par. d), providing that an action shall not be brought whereby to charge a defendant upon any oral agreemnt which is not to be performed within the space of one year from the making thereof.

FROM the chancery court of, first district, Chickasaw county.
HON. HENRY L. MULDROW, Chancellor.

Steen and others, appellants, propounded for probate in the court below a claim against the estate of Mrs. M. M. Steen, deceased, which was resisted by Kirkpatrick and others, appellees, heirs of the decedent. From a decree denying probate of the claim the proponents appealed to the supreme court. The facts are fully stated in the opinion of the court.

A. T. Stovall, for appellants.

The chancellor sustained the exception on the ideas:

1. That W. M. Steen was not a competent witness, being debarred by Code 1892, § 1740, and

2. That if he was a competent witness the contract could not be enforced by reason of par. b, of § 4225, Code 1892.

As to the first proposition, § 1740, Code 1892, says: "A person shall not testify as a witness to establish his own claim . . . against the estate of deceased person which originated during the lifetime of such deceased person."

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W. M. Steen did not testify to establish his own claim against the estate. *Kelly* v. *Miller,* 39 Miss., 17; *Mullins* v. *Cottrell,* 41 Miss., 291; *Sweatman, Exr.,* v. *Parker,* 49 Miss., 19; *Love* v. *Stone,* 56 Miss., 449; *McCutchen* v. *Rice,* 56 Miss., 455; *Fennell* v. *McGowan,* 58 Miss., 261; *Tucker* v. *Whitehead,* 59 Miss., 594; *Combs* v. *Black,* 62 Miss., 831; *Cole* v. *Gardner,* 67 Miss., 670; *Cock, Admr.,* v. *Abernathy, Admr.,* 77 Miss., 872.

If Steen testified to establish his own claim aganst the estate of a deceased person, it did not originate during the lifetime of the decedent. *Kelly* v. *Miller,* 39 Miss., 17; *Witherspoon* v. *Blewett,* 47 Miss., 570; *Tucker* v. *Whitehead,* 59 Miss., 594; *Covington* v. *Frank,* 77 Miss., 606.

Paragraph b, § 4225, Code 1892, provides, "An action shall not be brought whereby to charge a defendant or other party upon any agreement made upon consideration of marriage, mutual promises to marry excepted; unless the promise or agreement upon which such action may be brought or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some person by him or her thereunto lawfully authorized." This has no application at all to the case, for the testimony clearly shows that the parties had agreed to marry long before anything was said about descent, distribution or disposition of their property, in fact, they only made the arrangement about the disposition of their property the day before their marriage took place.

The most that can be said of it is that it was an agreement, or contract made in expectation or contemplation of marriage, and not in consideration of marriage. The consideration was the mutual relinquishment of prospective property rights, that is to say the prospective husband waived the right to a child's interest absolutely or in fee in the contemplated wife's estate in consideration of the contemplated wife waiving a like interest in the prospective husband's estate. *Rainbolt* v. *East,* 56 Ind.,

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Brief for appellees.

438; *Childe* v. *Pearl,* 43 Vt., 224; *Riley v. Riley,* 25 Conn., 154.

Harper & Potter, on the same side.

Counsel made the same points as their associate, Mr. Stovall, and cited in support thereof the following authorities: Bishop on Contracts, sec. 1276; *Rainbolt* v. *East,* 56 Ind., 538; *Riley* v. *Riley,* 25 Conn., 154; *Flenner* v. *Flenner,* 29 Ind., 564; *Brenner v. Brenner,* 48 Ind., 262; *Houghton* v. *Houghton,* 14 Ind., 505; 1 Bishop on Married Women, secs. 806, 807; *Richards* v. *Richards,* 17 Ind., 636; *Covington* v. *Frank,* 77 Miss., 606; *Cock* v. *Abernathy,* 77 Miss., 872; *McCutchen* v. *Rice,* 56 Miss., 455.

Bates & Harrington, for appellees.

Under the well-recognized rulings of this court in the cases of *Davis* v. *Richardson,* 45 Miss., 499; *Apple* v. *Ganong,* 47 Miss., 189; *Harrington* v. *Allen,* 48 Miss., 492, and *Wilson* v. *Beauchamp,* 50 Miss., 24, the matters of fact disclosed in the testimony, strictly confined to the issue of which the learned chancellor was the sole arbitor, fully sustain his order disallowing appellant's claim.

The testimony is incompetent by reason of the witness' personal interest in the subject-matter of this suit as an heir at law to the estate of T. J. Steen. *Rothschild* v. *Hatch,* 54 Miss., 554.

Proponent's claim is based on an alleged parol contract of marriage purporting to have been made between T. J. Steen and Mrs. M. M. Robinson about the 25th day of November, 1877.

This claim is condemned and not maintainable under the provisions of the statute of frauds, not being reduced to writing and signed by the parties, and because, if not condemned by this statute, the proof falls short of its legal establishment as a parol or oral agreement.

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Opinion of the court.

Under the statute, contracts in consideration of marriage are included within that class of cases, contracts which must be in writing.

It is a well-recognized principle, long settled, by well-considered and repeated adjudications of this court, that exceptions will not be ingrafted on the statute of frauds. *Beaman* v. *Buck,* 9 Smed. & M., 207; *Box* v. *Stanford,* 13 Smed. & M., 93; *Catlett* v. *Bacon,* 33 Miss., 269; *Hairston* v. *Jaudon,* 42 Miss., 380; *Gumbel* v. *Koon,* 59 Miss., 264.

A part of the subject-matter of the alleged contract was real estate, and the mere fact that Mrs. Steen chose to take personal property in the agreed division does not take it out of the statute of frauds. *Chase* v. *Fritz,* 132 Mass., 359; *Flemer* v. *Flemer,* 129 Ill., 564; *Lloyd* v. *Fulton,* 91 U. S., 479.

But, independent of the light thrown on the matter of contention by the testimony referred to, the record reveals an agreement designated as "Exhibit A" signed by the parties to this suit, by which they agree that the settlement of the T. J. Steen estate shall be final, precludes and estops proponents from setting up claim under the alleged marriage contract. This contract, Exhibit A, being reduced to writing and signed by the parties in interest, all alterations, propositions, offers, and conversations between the parties prior to its execution are inadmissible as evidence, and are merged into the writing, and that becomes the only exponent of what the contract was. 1 Greenleaf on Evidence (16th ed.), sec. 275; *Herndon* v. *Henderson,* 41 Miss., 584; *Kerr* v. *Kuykendall,* 44 Miss., 137; *Cocke* v. *Bailey,* 42 Miss., 81; *Cocke* v. *Blackbourn,* 58 Miss., 537; *Baum* v. *Lynn,* 72 Miss., 932.

Argued orally by *W. R. Harper,* for appellants.

CALHOON, J., delivered the opinion of the court.

Appellants rely on the following as facts: T. J. Steen, a widower, and Mrs. M. M. Robinson, a widow, each with a family of children, agreed to be married. After this agreement,

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and on the day before they actually were married, they made an independent oral agreement that the survivor should hold the share of the estate of the deceased spouse coming to him or her by law for life only, and that at the death of the survivor it should revert to the estate of the first decedent. Accordingly the husband being the first to die, the wife wanted her lawful share of his estate in money, so that she might know precisely the amount to go to her husband's estate, and this, by general consent, was done; and she got $1,750 as her share, and while she lived fully recognized this was to be, when she died, the property of her husband's estate. It is not easy to resist this conclusion of fact from the testimony of W. T. Steen, the eldest child of the deceased husband, abundantly corroborated as it is, if he was a competent witness; and we feel sure the learned chancellor must have arrived at the same conclusion, but must have based his decision on another or other grounds. After Mrs. Steen's death, the appellant, for himself, and as agent for the other heirs of his father, T. J. Steen, undertook to probate this claim, and it was contested by the heirs of Mrs. Steen, and it was allowed by the auditors; but the chancery court sustained exceptions to their report, and disallowed the claim, and the Steens appealed to this court. The heirs of Mrs. Steen set up as an estoppel an agreement between Mrs. Steen and the heirs of T. J. Steen to abide the apportionment by certain persons, agreed on between them all, in division of his estate between his widow and his heirs as a final settlement; but we do not think, and do not think the chancellor thought, this went beyond the then claims as distributees under the law, or that it applied at all to this claim arising after her death.

The real and only questions are whether the agreement before marriage was voidable because not in writing, and whether W. T. Steen was a competent witness.

We think W. T. Steen was a competent witness. We need not now decide that he was, because of the decision in *Cock* v.

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Abernathy, 77 Miss., 872 (28 So. Rep., 18), and its citations, but do so because this claim is a controversy between the two sets of children, and did not "originate during the lifetime of the decedent," Mrs. Steen. *Covington* v. *Frank,* 77 Miss., 606 (27 So. Rep., 1000). And this case also holds that the exception to the rule of competency stated in Code 1892, § 1740, must be construed strictly, and the exception must be within the letter and spirit of the act.

This same rule of construction applies to the statute of frauds, and an oral agreement which might be performed within a year will never be presumed to be in violation of it. *Duff* v. *Snider,* 54 Miss., 245; Bishop on Contracts, sec. 1276. In the case at bar the time of performance might have occurred within a year from the time of the agreement between T. J. Steen and Mrs. Robinson. The same rule of strict construction applies to that clause of the statute of frauds relating to agreements "made upon consideration of marriage," so that, to fall within that clause, the agreement must be strictly in consideration of marriage, and not merely made in contemplation of marriage, as in the case before us, after the mutual promises to marry had been made and become binding. 1 Bishop, Married Women, sec. 806; *Rainbolt* v. *East,* 56 Ind., 538 (26 Am. Rep., 40); *Riley* v. *Riley,* 25 Conn., 154; *Southerland* v. *Southerland's Admr.,* 5 Bush., 591; *Houghton* v. *Houghton,* 14 Ind., 505 (77 Am. Dec., 69).

The probated claim in the record before us is for the amount of "money and personal property" received by the deceased from her husband, T. J. Steen's estate. Of course, the pre-nuptial parol contract would not be enforced as to the real estate.

Reversed and remanded.

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Opinion of the court.

DANIEL W. E. PARSONS v. ROBERT H. RUTHERFORD, ADMR.

APPEAL. *Estoppel to prosecute. Consent to decree. Acceptance of proceeds.* A creditor of the estate of a decedent who was a party to a suit by which title to land was adjudged to have been in the decedent at the time of her death and the decree in which ordered the land sold to pay debts, is estopped to appeal therefrom after the sale has been made, and, by his consent, confirmed and he has received the sum due him from the estate out of its proceeds.

FROM the chancery court of Madison county.

HON. HENRY C. CONN, Chancellor.

Rutherford, administrator of the estate of Ann E. Parsons, deceased, was the complainant; and Parsons, appellant, defendant in the court below. From a decree adjudging the title to some lands to have been in the decedent at the time of her death, and ordering it sold to pay the debts probated against the estate, Parsons appealed to the supreme court. It appeared that appellant, Parsons, was a creditor of the estate; that after the rendition of the decree appealed from a sale of the lands was made thereunder and the lands sold for a sum sufficient to pay all of the debts; that the sale was reported to the court, and the appellant, Parsons, signed a petition to the court asking that said sale should be confirmed, and it was thereupon confirmed, and the appellant, Parsons, accepted from the administrator, appellee, payment in full of his debt against the estate of the decedent from the proceeds of the sale.

Harris & Powell, for appellant.

J. B. Chrisman, for appellee.

WHITFIELD, C. J., delivered the opinion of the court.

D. W. E Parsons, the appellant, instead of appealing from the decree rendered September 23, 1902, establishing Ann Par-

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sons' title to the land involved, and ordering it sold, to pay her creditors, of whom appellant was himself the largest one, allowed the sale to be made, and received his debt in full out of the proceeds of the sale, and on December 9, 1902, signed the following paper:

"The State of Mississippi, Madison county. In the chancery court before the chancellor in vacation. We have examined the report of R. H. Rutherford, administrator of the estate of Ann E. Parsons, deceased, making sale of certain real estate therein described, and we all unite in asking the confirmation thereof in vacation. J. Downs, attorney for administrator. A. Tuteur. H. B. Greaves, attorney of record of D. W. E. Parsons. December 9, 1902."

In pursuance of this request and the previous proceedings, the chancellor on December 15, 1902, confirmed the sale, and again, on February 23, 1903, confirmed the sale in term time, ordering a deed made to the purchaser, Tuteur. After all this had been done, on December 1, 1903, this appellant prayed this appeal. It is perfectly clear that he is estopped by his conduct appearing on the face of the record in this cause to prosecute this appeal.

Wherefore the said appeal is dismissed.

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Statement of the case.

COLUMBUS W. MITCHELL *v.* MARY D. BOND.

1. TAXATION. *Tax sale. Lands held by levee board.*

   While lands belonged to the board of liquidating levee commissioners, under a valid tax sale for levee taxes, they were not subject to be again sold for levee taxes, and if so resold, no title is thereby conveyed.

2. SAME. *Statute of limitations. Code* 1892, § 2735.

   The three years' statute of limitations, Code 1892, § 2735, providing that three years' actual occupation of land under a tax title shall cure all defects in the title and bar suits to recover the land, has no application where the land was not subject to taxation at the time it was sold for taxes.

3. SAME. *Adverse possession of part.*

   Where a deed is void as to a part of the land conveyed, but the grantee occupies a portion thereof to which, under another deed, he actually has title, such fact does not give him constructive possession of the other part, so as to disseize the real owner, unless the occupation be such as to raise a reasonable presumption that the rightful owner knew of the entry made under the color of title.

4. SAME. *Code* 1892, §§ 2730, 2731, 2734. *Scrambling possession.*

   A mere scrambling possession is not sufficient to support a defense of the statutes of limitations, under Code 1892, §§ 2730, 2731, 2734, barring all suits for the possession of land where defendant or those under whom he claims has been in the actual adverse possession thereof for ten years before plaintiff's cause of action accrued.

FROM the chancery court of Tunica county.

HON. A. McC. KIMBROUGH, Chancellor.

Mrs. Bond, appellee, was complainant in the court below; Mitchell, appellant, was defendant there. From a decree in complainant's favor the defendant appealed to the supreme court. The facts are sufficiently apparent from the opinion of the court.

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Brief for appellant.

J. T. Lowe, for appellant.

The court below should have sustained the demurrer; the bill of complaint did not show a perfect title to the land in the complainant. *Pierce* v. *Hunter,* 73 Miss., 754; *Wilkinson* v. *Hiller,* 71 Miss., 678; *Chiles* v. *Gallagher,* 67 Miss., 413; *Hart* v. *Bloomfield,* 66 Miss., 100; *Griffin* v. *Harrison,* 52 Miss., 824; *Handy* v. *Noonan,* 51 Miss., 166; *Walton* v. *Tusten,* 49 Miss., 569.

Complainant's so-called redemption, from H. W. Warren, liquidating levee commissioner, is wholly insufficient, in so far as it purports to have redeemed the lands from the sale made to the levee board on the 12th day of May, 1869. This redemption is a redemption, and not a deed.

The redemption certificate specifically states that the said redemption was had by the paying of certain funds, thereby negativing the idea that the different funds, for which said lands were held, were paid, and therefore the redemption fails. These lands that were purchased by the levee board, if the sales were valid, as well as the funds derived from the sale of said lands, were held as an especial trust for the purpose of paying off the bonds, interest thereon, and attendant expenses, in the administration of the prescribed duties under the said act of 1867, p. 237; and it was beyond the power and authority of H. W. Warren, liquidating levee commissioner, to part with said land so held in trust, either by deed, redemption, or otherwise than by the payment to him of the full and entire amount for which said lands were held. This court held in *Gibbs* v. *Green,* 54 Miss., 592, that the act of 1867 was a compact entered into by and with the legislature of the state, on behalf of the state, and the authorities of the levee district on the one hand and the holders of the new bonds, issued under the said act of 1867 on the other hand; and that the legislature itself had not the power to change said compact one iota. If the said appellee stood on his deed to the state under the tax sale of 1863, and his redemption from the circuit clerk, Dunaway, of said lands, in

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Brief for appellant.

1873, then the demurrer should have been sustained; for the said sale of 1863 was in part for taxes due for confederate war purposes, and said sale was therefore void. *Dogan* v. *Griffin,* 51 Miss., 782; *Bailey* v. *Fitz-Gerald,* 56 Miss., 586.

When appellant entered under his deed, and went to clearing and improving the land, his possession was not limited to the land he bought in said section 5, or to the lands he bought in said section 9, or to the lands he bought in said section 4, but it was coextensive with the boundaries in the calls of his deed. *Wilson* v. *Williams,* 52 Miss., 487; *Green* v. *Irving,* 54 Miss., 450; *Davis* v. *Davis,* 68 Miss., 478; *Taylor* v. *Buckner,* 12 Am. Dec., 357; *Riley* v. *Jamerson,* 14 Am. Dec., 25 (93 Am. Dec., 448); *Hunnicutt* v. *Barnes,* 26 U. S., 113. And appellant continued clearing and improving said land, exercising ownership over all of said land until said land was sued for in this cause twenty years after he bought and entered on same.

Appellant's actual occupation and adverse possession for more than ten years of said land had ripened into a perfect title. *Geohegan* v. *Marshall,* 66 Miss., 676.

Under the ten-year statute of limitations, which is set up by appellant in this cause, he was clearly entitled, under the showing made, by all the testimony in the case, to have been decreed the rightful owner of the land in controversy; likewise, the three years' statute of limitations, pleaded by him, in his defense in this cause was well taken; and under the facts, the court should have dismissed complainant's original bill.

Mayes & Longstreet on same side.

Appellant had a good title by ten years' possession, which title vested in him in the beginning of the year 1891, ten years before this suit was brought. *Hanna* v. *Renfro,* 32 Miss., 125; *Welborn* v. *Anderson,* 37 Miss., 155; *Metcalfe* v. *McCutchen,* 60 Miss., 145; *Jones* v. *Gaddis,* 67 Miss., 761; *Brougher* v. *Stone,* 72 Miss., 647; *Railway Co.* v. *Buford,* 73 Miss., 494.

The case of *Brougher* v. *Stone* is especially pertinent here

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Brief for appellant.

because it shows that where one deed contains two lots of land contiguous, the actual possession of one is also possession of the other.

This case does not fall within the special rule laid down in the case of *Railway Co.* v. *Buford.* In that case both the adverse claimants were actually upon the land in controversy and the court held that the possession of the unenclosed lands would be attributed to that one of the two claimants who finally showed the superior title. That special feature of that case does not apply here for the reason, as shown, that neither Mrs. Bond nor any of the Miller people were ever in actual possession of any of this section, or, indeed, were ever on it, in even the most accidental and transient way, until after appellant's title had become vested. 3 Washburn on Real Property, 167, 168; *Webb* v. *Richardson,* 42 Vt., 465; *Kimball* v. *Storm,* 65 Calif., 116; Buswell on Lim. and Ad. Poss., 353; 1 Am. & Eng. Ency. Law, 824; 23 Am. St. Rep., 159; 34 Iowa, 564; 66 Iowa, 684; 56 Iowa, 381; 58 Tex., 570; 61 N. Y., 52; *Smith* v. *Keyser,* 115 Ala., 455.

The payment of taxes by the Millers or Mrs. Bond did not constitute an interruption to Miller's estate, nor is it in itself any evidence of ouster of him by her. 1 Am. & Eng. Ency. Law, 831, and cases cited; 95 Pa. St., 72; 76 Mo., 63; *Reddick* v. *Long,* 124 Ala., 260; *Wiggins* v. *Kirby,* 106 Ala., 262; *Chamberlain* v. *Abadie,* 48 La. Ann., 587.

W. J. East, on same side.

Patterson v. *Durfey,* 68 Miss., 779, controls in this case. *Hoskins* v. *Railroad Co.,* 78 Miss., 768, in which *Patterson* v. *Durfey* was modified, does not necessarily overrule the doctrine long acquiesced in by parties in this state because in the last mentioned case the land had never been the subject of state taxation, and, therefore, could not be delinquent. But in the case at bar, the land was subject to taxation and could be delinquent. It had been legally sold for taxes, although perhaps an effort

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Brief for appellee.

had been made to redeem it. The truth is, it was still condemned and subjected by a solemn decree of this court as property of the levee board, and we contend that the three years' occupancy of lands under tax sales does apply, and that Mitchell's occupancy of the twenty-five acres on the east part of section 4, undisturbed for a longer period than three years, perfected his title and rendered his holding unassailable.

F. A. Montgomery, for appellee.

The complainant, appellee, has in her proof fully met the requirements of the law as to proving her title to the land in controversy. She deraigned a perfect title in herself, coming down from the original patentee to her, and no argument was made against her title in the lower court.

The proof is abundant that she has been the sole and undisputed owner of the land in controversy from the time that her father's estate was divided by the chancery court of Tunica county, between herself and her two brothers, Charles A. and Austin Miller, in the year 1874, down to the present date; and while the answer of the appellant denies the fact, no effort was made to dispute it on trial of the cause in the lower court, and no successful effort could be made.

It is equally clear and undisputed that either the complainant, or one of her brothers for her, or her husband, Judge Bond, of St. Louis, or her former guardian, Captain McNeal, have continuously, every year, since this land was redeemed from the tax sale of 1869 by A. T. McNeal, guardian, to wit, in October, 1873, paid all taxes, state, county and levee, which were assessed against the land in controversy.

It is equally undisputed and clearly proven that neither Captain McNeal, when he was guardian of the complainant, nor Austin nor Charles Miller, when they acted as her agent, nor Judge Bond, her husband, nor herself, ever had the slightest intimation or knowledge that the appellant or any one else

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Brief for appellee.

pretended to have any adverse claim to the land in controversy until within a very few months before this suit was brought.

It is very clear, therefore, from this record that the complainant, appellee, must prevail in this suit, unless the defendant, appellant, has a good tax title to the land.

While many of the tax receipts are lost, it is competent to prove in this state of the case by parol evidence that the taxes were paid. *Perret* v. *Borries,* 78 Miss., 934.

The appellant has no paper title to the land in controversy except his deed from Gwin and Hemingway, commissioners, purporting to convey a liquidating levee tax title of date October 14, 1880.

This deed is void and conveyed to the appellant no title because the record shows that the only sale to the liquidating levee commissioners for taxes was a sale in 1869 by I. Boatman, sheriff of Tunica county, and the record further shows that Captain McNeal, the guardian of the complainant, and her brothers, in October, 1873 redeemed this land from all sales to the liquidating levee commissioners and obtained a deed of redemption from H. W. Warren, liquidating levee commissioner, reconveying it to the said owners.

That he also redeemed it from any forfeitures to the state from C. W. Dunnaway, circuit clerk, under the act of 1872, p. 9, and act of 1873, p. 91.

The board of liquidating levee commissioners was incorporated in 1867, and this court is entirely familiar with the object and purposes for which that board was created. Laws 1867, p. 237.

Under that act the sheriff was made the liquidating levee tax collector in the several counties, and thereunder the sheriff of Tunica county sold the land in controversy in 1869 for taxes due the liquidating levee board.

In 1871 this act was amended and it was provided that in lieu of the three liquidating levee commissioners, constituting the board, there should be appointed one liquidating levee com-

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Brief for appellee.

missioner, who should be the successor of the old board of liquidating levee commissioners, and who was vested with all of the titles to lands which were in the said liquidating levee commissioners, and he was authorized to sell and convey the same and issue redemption certificates. Laws 1871, pp. 57, 60, 61, 62.

Under this last mentioned act, H. W. Warren became the liquidating levee commissioner, and it was from him that the land was redeemed in 1873.

There nowhere appears to have been any sale to the state, although there appears a redemption from the circuit clerk of Tunica county, in June, 1873.

There also appears in the records a sale in January, 1873, of this land to Levee Board No. One, which was a different corporation, created in 1871, for the purpose of building and maintaining a line of levees. Laws 1871, p. 1.

The sale to the No. One Levee Board, however, was void, because at the time it was made, to wit, in January, 1873, the land in controversy was the property of the board of liquidating levee commissioners, under the I. Boatman sale of 1869, and it was, therefore, not subject to sale for No. One levee taxes. *Mayer* v. *Peebles,* 58 Miss., 628.

The land in controversy being therefore, in 1873, purchased or redeemed by the owner from the liquidating levee sale, it was improperly listed in the lands involved in the suit of *Gibbs* v. *Green,* 54 Miss., 610.

In that case the supreme court, holding the abatement act of 1875 to be unconstitutional, so far as it affected the titles of the liquidating levee board to lands forfeited to them for taxes, say that the court may direct a sale of the land, but cannot interfere with the lands which had been redeemed.

The redemption or purchase of the land in October, 1873, therefore extinguished the tax title, and placed the owners in *statu quo.* Black on Tax Titles, 197.

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Brief for appellee.

The pretended tax title under which the appellant claims is, therefore, void and extinguished.

The appellant, claiming under the void deed, attempts to defend himself upon the plea of ten years' adverse possession, but the proof does not bear him out. His only proof of possession extending over that length of time is that he had, during the several years succeeding the year 1881, cut some boards and wood off of the land, and the testimony of three witnesses of a later date, to have heard him claim to own the land, and even these three witnesses were evidently not believed by the chancellor.

Adverse possession means actual visible and exclusive appropriation of the land, commenced and continued under a claim of right, and every presumption is to be indulged in favor of the true owner. *Magee* v. *Magee,* 37 Miss., 138; 1 Am. & Eng. Ency. Law, 888, 889.

The term adverse possession is founded on the presumption of the true owner's knowledge of the same, and the court will not be warranted in presuming it in every case. *Alexander* v. *Polk,* 39 Miss., 737.

Adverse possession under colorable title cannot be set up where the party knows the title is not good. 1 Am. & Eng. Ency. Law, 868.

But the proof shows, by the appellant's own admission, that he never did claim to own this land.

He actually wrote a letter in 1889, to the brother and agent of appellee, addressing him as Austin Miller, agent for Mary D. Miller, or Bond (spelling it Bode), stating that she owned this land and asking her to sell forty acres of it to W. M. Pratt.

In the case of *Hoskins* v. *Illinois Central Railroad Co.,* 78 Miss., 768, our supreme court has overruled the cases of *Patterson* v. *Durfey,* 68 Miss., 779, and *Carlisle* v. *Yoder,* 69 Miss., 384. And it is now held that the three years' statute does not apply in the case where the land was not delinquent for taxes.

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Opinion of the court.

Argued orally by *Edward Mayes,* and *W. J. East,* for appellant; and by *F. A. Montgomery,* for appellee.

WHITFIELD, C. J., delivered the opinion of the court.

The paper title of appellee, as deraigned in the bill, is perfect from the government down to the appellee. The only paper title set up by the appellant is a deed made on October 14, 1880, by Gwin and Hemmingway, liquidating levee commissioners, and commissioners of the chancery court of Hinds county, in the case of Green against Gibbs, *et al.* The land was sold on May 12, 1869, by the sheriff of Tunica county, to the liquidating levee board for delinquent taxes. On October 22, 1873, appellee redeemed the land from H. W. Warren, levee commissioner. On June 4, 1873, appellee redeemed the land from the forfeitures for state and county taxes from the circuit clerk of Tunica county by redemption certificate, as provided by law at that time. There is some verbal criticism of the redemption deed from Warren, leevee commissioner, but, as we think, it is without merit. These redemptions completely reinvested appellee with the paper title to the land. The land was not sold in 1873 to the liquidating levee board because it was not delinquent for that year, nor subject to such sale. The pretended sale in January, 1873, of this land to Levee Board No. 1 was void, because at that time the land was the property of the liquidating board under the sale of 1869, and it was therefore not subject to sale for No. 1 levee taxes. *Mayer* v. *Peebles,* 58 Miss., 628. From the time of such redemption in 1873 down to the present time the appellee has paid promptly all the taxes due on said land. It is perfectly clear, therefore, that this land, thus redeemed, was not the property of the liquidating levee board, and was improperly listed amongst lands subject to sale under the Gibbs-Green decree. *Gibbs* v. *Green,* 54 Miss., 610. It was settled in the case of *Hoskins* v. *I. C. R. R. Co.,* 78 Miss., 768 (29 So. Rep., 518; 84 Am. St. Rep., 644), that the three-years' statute of limitations (Ann. Code 1892, § 2735) applies only

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to lands that were taxable, and therefore subject to sale when the sale occurred. The land here was not subject to sale under the Gibbs-Green decree, because it was not of the class which could legally be sold under that decree; that is to say, not the property of the liquidating levee board. The deed, consequently, of October 14, 1880, under which appellant claims paper title, is void. From these considerations it is plain that appellant has no paper title, and, furthermore, that the said three-years' statute of limitations has no application. The only defense which appellant can invoke with any show of reason—and that is the defense which is almost exclusively insisted on here—is that he has acquired title by ten years' adverse possession. What are the facts with respect to this possession? We will briefly recount the main facts bearing on this defense. The appellee has paid all the taxes from 1873 to this time, and the land has always been assessed in her name. Appellant has never paid any taxes; nor did he ever make any attempt to have the land assessed to himself until the year 1900. He never offered to pay any taxes until about 1897, when he found they had been paid by appellee. The land is wild land, chiefly valuable for its timber. Appellee sold timber to several parties who went upon the land and cut timber therefrom, notably to Ingram Stave Company, on November 15, 1895. This company was on this land between one and two years, with the full knowledge and acquiescence of the appellant, who was living within less than one mile of this land, on an adjoining section, and was frequently at the camp and mill of the said company. At this very time appellant had a pasture for hogs which extended from his own land partly over the land in controversy, embracing some timber suitable for staves; and appellant told the agent of the stave company, J. T. Norment, when he wanted those trees, to tear down his fence and go in there and get them. Appellee, who lived in St. Louis, Mo., never heard of any claim to this land set up by appellant until 1900, when appellant served notice on Muskelly forbidding him to cut staves under a

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deed made by appellee to Muskelly October 9, 1900. Appellee made three sales of timber—one to A. B. Nelson & Co., February 29, 1884; one above mentioned to the Ingram Stave Company in 1895; and the one just above mentioned to J. W. Muskelly, October 9, 1900. It appears that Nelson & Co. cut some oak timber on the land in 1886. In 1881 or 1882 appellant had a survey made of some land cornering with the land in controversy by a surveyor, George W. Owens, who says the appellant told him he expected to buy some of it from the state. At that time the surveyor did not survey section 4. That in 1896 he ran the survey line of the land in controversy for appellee's brother, C. H. Miller. That it was other land, and not this land in controversy, that he surveyed for appellant; and that throughout all these dealings he never heard appellant claim to own this land. In addition to this, appellee showed by her proof that when W. M. Pratt, desiring, in 1889, to buy forty acres of this land, inquired of the appellant, Mitchell, who owned the land, he was informed by Mitchell that it belonged to the Miller heirs, and at Pratt's request Mitchell wrote a letter for Pratt, which is as follows:

"SENATOBIA, MISS., December 16, 1889.

"Austin Miller, Agent for Mary D. Miller, or Bond:—You own section 4, township 6, range 10, in Tunica county. I want to buy forty acres of the southwest corner. There is no salable timber on this forty. The timber was cut off by Louis Nelson in 1883. I am a poor man and not able to buy more than forty acres of land in the woods.

"If you will sell, let me know by return mail, and your lowest prices and best terms on one, two and three payments. You will please write to me soon and give me an answer, for if I buy, I want to build this winter and clear up ten acres the coming year.

"Direct your letter to W. M. Pratt, in care of C. W. Mitchell, at Senatobia, Miss. Yours truly, [Signed] W. M. PRATT."

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To which he received the following reply:

"BOLIVAR, TENN., February 6, 1890.

"To W. M. Pratt, Esq., Senatobia, Miss.—Dear Sir: The land that you speak of belongs to my sister, Mary D. Miller, now Mrs. Mary D. Bond. She lives in St. Louis, Mo., and would not care to sell so small a piece of land unless she got a price sufficient to make her break section lines.

"Please write me what you are willing to give for the forty acres that you want and how much cash you wish to pay on the same. We want to sell the same if the price justifies.

Yours truly, [Signed] AUSTIN MILLER."

It will be specially noted with reference to this letter and the answer that it was dated in December, 1889, the answer February 6, 1890, and that the letter was addressed to Austin Miller, agent for Mary D. Miller, or Bond. Appellant attempts to explain this letter in a way not necessary to set out, but not, we think, satisfactorily. Finally, it appears from the cross-examination of appellant that he had examined the records to see if the sales under which he had bought had been redeemed from, and that he had seen and read the redemption deed from H. W. Warren, liquidating levee commissioner, to appellee and her two brothers, to this land, and he never afterwards really claimed under his paper title. This is a very important piece of testimony as bearing upon the good faith of appellant's claim to the land. In vol. 1, Am. & Eng. Ency. Law (2d ed.), p. 861, par. 4, it is said: "While a person who accepts a defective title to land and goes into possession under it knowing the defect may, nevertheless, by virtue of his adverse possession under claim of title alone, plead the statute of limitations in bar against any action brought for the recovery of the land, yet the general rule is that possession under a defective title by a grantee who knows the defect must be limited to his actual occupancy. In other words, to entitle a claimant under color of title to the benefit of the

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doctrine of constructive possession, there must be a bona fide reliance upon the merely apparent title as being good and valid. Therefore, if the instrument constituting color of title was obtained by fraud on the part of the grantee, or with a knowledge by him that it conveys no title, he cannot have the advantage of an entry under color of title." Under the testimony just mentioned it might well be held that complainant knew that his title under the deed of October 14, 1880, was void. It is true that a void deed affords color of title, and that the general rule is that one claiming title by adverse possession under a deed affording color of title has the right to have his possession treated as coextensive with the calls of his deed; but there is a well-settled exception to the general rule, which is stated as follows by this court in *Jones* v. *Gaddis,* 67 Miss., 769 (7 So. Rep., 491): "The rule is correct, but this limitation upon the rule must not be overlooked, viz.: If the title was void as to part of the land conveyed, the occupation of that part to which the grantee had title will not give the grantee constructive possession of the other part to which he had no title, so as to disseize the real owner. To divest the rightful owner of the whole tract described in the deed, the partial occupation must be of such a character as to give rise to a reasonable presumption that the rightful owner knows that the entry was made under color of title; and, if this presumpton be not reasonable, under the circumstances of the case, the disseizin will not extend beyond the actual occupation." Citing Tiedman on Real Property, par. 696; *Bailey* v. *Carleton* 12 N. H., 9 (37 Am. Dec., 190); *Jackson* v. *Woodruff,* 1 Cow., 286 (13 Am. Dec., 525); *Osborne* v. *Ballew,* 34 N. C., 377; *Seigle* v. *Louderbaugh,* 5 Pa., 490. See, also, 1 Am. & Eng. Ency. Law (2d. ed.), 861-864, and notes, with cases cited. This doctrine is clearly set forth in vol. 1, Cyc., p. 1130, as follows: "Where the title to land is in conflict, and each claimant is in possession in part of the tract in controversy, the one having the better title has, by his occupation, constructive possession of the whole tract, except that which is actu-

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ally in the possession of his adversary. The legal seizin as to the unoccupied portion of the tract follows the legal title, and the *pedis possessio* alone creates an adverse title." And also in vol. 1, Am. & Eng. Ency. Law, p. 866; "In the case where a person who has a good title to one portion of a tract of land, but a merely colorable title to another part, enters upon and actually occupies the part to which he has a valid title, it would seem, though the question has not yet been definitely settled by the authorities, that such entry and possession will not give him constructive possession of the part to which he has only color of title." Now, in this case, the deed of October 14, 1880, attempted to convey the land in controversy (section 4), and also the eastern port of section 5, which adjoined section 4. Appellee is not contesting appellant's title to section 5. Her deed embraces only section 4. Appellant's precise contention is that, since he has been in possession of section 5, which he says he does own, he is entitled, under the general rule above stated, to claim that his adverse possession extends to and embraces the whole of section 4, to which he has no paper title at all. This statement of his claim places him precisely within the exception to the general rule which is set out in the above authorities.

We are clearly of the opinion upon the facts in evidence and the law applicable to them that appellant never had anything but a mere scrambling possession, and that the court below rightfully decided this controversy; wherefore the decree is affirmed.

Affirmed.

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Statement of the case.

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WESTERN UNION TELEGRAPH CO. v. ELIZABETH SPRATLEY.

TELEGRAPH COMPANY. *Night message. Delay. Exemplary damages. Contributory negligence. Actual damages.*

The sendee of a telegraphic message is not entitled, because of delay in its delivery, to recover from the telegraph company:

(a) Exemplary damages in the absence of gross negligence, willful wrong and wanton disregard of plaintiff's rights; nor

(b) Actual damages which resulted not from delay in the delivery of the message, but from plaintiff's failure to promptly answer it when it was delivered.

FROM the circuit court of Monroe county.

HON. EUGENE O. SYKES, Judge.

Mrs. Spratley, appellee, was plaintiff in the court below; the Telegraph Company, appellant, was defendant there. From a verdict and judgment for $200 in plaintiff's favor defendant appealed to the supreme court.

The plaintiff, a colored woman, resided at Aberdeen, Miss. She was fairly well known in the community by the name of Betsey Spratley, but was known to very few people by the name of "Mrs. B. B. Spratley." Her husband, who died at Pensacola, Fla., January 20, 1903, was named B. B. Spratley. On the night of that day a night message was delivered to the telegraph company at Pensacola, Fla., for transmission to Aberdeen—paid for by the sender—which read as follows:

"Mrs. B. B. Spratley, Aberdeen, Miss.—Your husband is dead. What about his body? Answer.

"[Signed] MASON, 8:40 P. M."

One of the conditions on which the night message was received by the company was to the effect that it was not required to be delivered until business hours on the morning of the next day. When the telegraph office at Aberdeen opened at 8 o'clock A. M., January 21st, the messenger boy took the message, which

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had been properly written out by the operator, and proceeded to search for Mrs. B. B. Spratley. The telegraph messenger, operator and force did not know Betsey Spratley or Mrs. B. B. Spratley. The telegraph messenger industriously inquired for Mrs. B. B. Spratley, but did not find any one who knew her by that name. He returned to the telegraph office and reported that he was unable to find Mrs. B. B. Spratley, and the telegraph company sent a "service message" back to Pensacola asking for a better address. It did not cease, however, to make inquiry for Mrs. Spratley, and succeeded, before response came to the "service message," in finding her about 1 o'clock P. M., of January 21st. Mrs. Spratley did not make reply to the message through the messenger boy, but an hour or two after she had received the message, she dressed herself and went down town and conferred with a relative, who, at 4:45 P. M. on that day, sent a message, not by the appellant company, but by the Postal Telegraph Company, to Mason at Pensacola, requesting him to have the body of the deceased Spratley shipped to Aberdeen by express. When Mason received this request in Pensacola the body of the deceased Spratley had been buried about one hour, and as a consequence the remains were not transported to Aberdeen for burial. Other facts are stated in the opinion of the court.

Harris & Powell, and *E. O. Sykes, Jr.,* for appellant.

The Watson case, 82 Miss., 101, was decided upon its peculiar facts and has no application to the case at bar.

Now, the declaration sets forth as a cause of action that the message, although sent from Pensacola, Fla., on the 20th, when the death occurred, was not to be delivered earlier than the morning of the next ensuing business day. The declaration alleges that the telegraph company wrongfully and willfully refused to deliver the message until it was too late for the plaintiff to have her husband's body shipped to Aberdeen for interment. The proof shows that upon the morning of the 21st,

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after the receipt of the message, not only was the messenger boy sent out to attempt to make delivery of the message, but the operator himself, the manager of the office at Aberdeen, attempted to locate the plaintiff.

The telegram announcing the death called for an answer, but the plaintiff did not answer it by the messenger boy who took it to her, but waited some time, an hour or more, then went to town and got another person to answer the message, and he went to the Postal Telegraph Company and sent the answer through that company.

Plaintiff was not known as Mrs. B. B. Spratley, but was known as Betsey Spratley. She lived in an obscure neighborhood and was unknown to the messenger boy who was searching for her.

The testimony in this case does not warrant the imposition of punitive damages.

It will be noted that the plaintiff paid nothing to the defendant for the message announcing the death of her husband. That was paid for by Mason. There was no evidence that the plaintiff was out a dollar, and the testimony is overwhelming that she received the telegram announcing the death of her husband in ample time for her, if she had acted with promptness, to have had the body shipped. The delay which resulted in the burial in Florida was the plaintiff's own delay, or the delay on the part of the Postal Telegraph Company, the agency which she had selected for the transmission of the answering message.

There must be some clear proof or circumstances of willful wrong to justify the imposition of punitive damages. Such are not shown in the case at bar.

George C. Paine, for appellee.

It required the opinions of the cases of *Magouirk* v. *Tel. Co.,* 79 Miss., 632, and *Watson* v. *Same,* 82 Miss., 101 (s. c., 33 So. Rep., 76), and *Pearce* v. *Same,* 82 Miss., 481 (s. c., 34 So.

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Brief for appellee.

Rep., 152), to explain the case of *Rogers* v. *Tel. Co.*, 68 Miss., 748.

This latter case has been a kind of *pons asinorum* to the legal fraternity in suits like the one at bar.

That case is a very involved and erudite one, and it requires careful analysis to disclose its intricate discrimination of the principles upon which the damages for mental suffering will be allowed. In the language of Hamlet, in order to be able to do this, a man must "know a hawk from a hand-saw."

This duty has been performed by Judge Whitfield in the above cited cases. In his opinion in these cases, he has clarified the distinction in a masterful way.

The case at bar is as strong and meritorious as the case of Watson. The fact that the appellee had lived in her own home within the corporate limits of Aberdeen for twenty-three years will compensate for any apparent difference in the retention of the telegram in the Watson case. The cases are quite similar in their leading facts, the only substantial difference being the delay in delivering the message. The appellee and her husband were among the prominent negroes in Aberdeen. Both were educated and refined negroes.

The message here was received during the evening of the 20th of January, 1903, and was contracted to be delivered within business hours of the morning of January 21, 1903.

Counsel does not question the fact that McDoughal, the manager of the appellant's office in Aberdeen, sent the message out by the messenger boy, Lamon.

McDoughal presumed the addressee was a negress, yet it is strange that he only inquired of two white men, comparatively strangers in Aberdeen, as to who she was and where she lived.

Lamon, the messenger boy who had the message, is shown to have been unworthy of belief.

Argued orally by *J. B Harris,* for appellant.

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Opinion of the court.

TRULY, J., delivered the opinion of the court.

The peremptory instruction asked by the appellant should have been granted. Neither the language of the message nor the terms under which it was sent indicated any cause for special urgency in its delivery. Appellee's residence was not known, and reasonable diligence was shown in the efforts of the manager of the appellant company in endeavoring to ascertain her whereabouts, so that the message might be delivered. The message was a "night message," was not intended to be delivered until business hours the next morning, was sent out by a messenger immediately upon the opening of the office, the manager himself made special inquiries and failing to locate the residence of appellee, sent a "service message" for a better address, and the message was in fact delivered before 1 o'clock of the day on which it was to have been delivered, and in ample time for appellee to have answered before her husband was buried, had she used due diligence. Conceding the truth of all of the testimony for appellee, the case made does not authorize the imposition of exemplary damages. The Watson case, 82 Miss., 101 (s. c., 33 So. Rep., 76), is totally different from the case at bar: Here there was no gross negligence, no willful wrong, no wanton disregard of appellee's rights, and, consequently, there could be no recovery of punitive damages.

Reversed and remanded.

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Statement of the case.

MISSISSIPPI COTTON OIL COMPANY v. BEATRICE W. BUSTER.

1. ARBITRATION AND AWARD. *Notice. Appearance. Code* 1892, § 98.

Where the parties to an arbitration appeared by counsel at the hearing before the arbitrators, it is immaterial that the record fails to show that they were notified to so appear. (Code 1892, § 98.)

2. SAME. *Informal award. Consent of counsel. Formal award. Time and place of signing. Code* 1892, § 104.

Where, after a hearing by arbitrators, the parties being represented before them by counsel, their findings were reduced to writing and signed by them at the same time and in the presence of each other, it is competent for the counsel to agree that the award so drawn may be afterward put in proper form, and in such case it is no objection to the formal award that it was not signed by the arbitrators at the same time and place. (Code 1892, § 104.)

3. SAME. *Umpire acting with arbitrators. Waiver of objection.*

An objection to an award, predicated of the fact that the umpire who was to be called upon to act only in case of a disagreement between the arbitrators selected by the parties, was sworn and acted with the arbitrators from the beginning, is waived if the parties are present at the hearing and do not object to such procedure.

4. SAME. *Impeachment of award. Evidence. Arbitrator incompetent witness.*

It is not competent to impeach an award by the testimony of an arbitrator who executed the same.

FROM the circuit court of Yazoo county.

HON. D. M. MILLER, Judge.

Mrs. Buster, appellee, was plaintiff; and the Cotton Oil Company, appellant, defendant in the court below. The proceeding was an application to the court, under Code 1892, § 105, to confirm an award. The formal award showed on its face that the parties appeared by counsel before the arbitors, but the

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Brief for appellant.

original one, quoted in the opinion of the court did not so show. From a judgment in plaintiff's favor the defendant appealed to the supreme court.

The facts sufficiently appear from the opinion of the court.

T. H. Campbell, and *Henry & Barbour,* for appellant.

It was improper for the umpire, Lacey, to sit with the arbitrators until they had made an earnest, honest and faithful effort to agree on an award. If they failed to settle on the award the umpire alone should have rendered his finding without consultation or assistance from the original arbitrators. 2 Am. & Eng. Ency. Law (2d ed.), 711; *Haven* v. *Winnismell,* 11 Allan. (Mass.), 377. It will not do to say that Landau, counsel for the appellant, consented to the course of procedure adopted in the case. He may have consented for the umpire, Lacey, to hear the testimony taken before the arbitrators, but he did not consent in any way to the umpire participating in the discussion of the case by and between the arbitrators in the manner in which he did. Under the agreement with Landau, Lacey should have retired after the testimony had been taken, and Hollinsworth and Crane alone should have wrestled as best they could with the matter and Landau should not have been called upon to pass judgment until disagreement arose between the original arbitrators, and Lacey should have been permitted to have exercised an independent judgment without suggestions from Hollinsworth and Crane. In this case it is manifest that Hollinsworth practically injected his own conclusions into the minds of Crane and Lacey. The original signed as an award was a complete and perfect common law award, aside from the fact that it was vitiated by the course of procedure above condemned. It could have been enforced but for that course of procedure by a suit at law, although it could not have been enforced under the statute.

In this case the court did not enforce this original finding, but enforced what is called the formal award which was written

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Brief for appellee.

by Barnett and which was signed by the two arbitrators and by the umpire at separate times and at separate places. This last so-called formal award is and was void. 2 Am. & Eng. Ency. Law (2d. ed.), 731. It is uniformly held that where there are several arbitrators, it is essential that they each sign the award at the same time and in the presence of each other. *Moore* v. *Ewing,* 1 N. J. Law, 167; 39 Mich., 39; 10 Mich., 237. Arbitrators constitute a court. An agreement on an award to be afterwards signed up is not binding on the arbitrators. *Edmondson* v. *Wilson* (Ala.), 19 So. Rep., 367. The statement of Landay to Crane that Barnett might put the finding of the arbitrators in shape did not authorize the separate signing of the instrument drawn by Barnett at various times not in the presence of each other. Certainly Landau's consent that an award might be put in form cannot be construed to supply deficiencies in the record. Landau never consented in any way to the recital in the so-called formal award that the parties appeared by counsel.

Barnett & Perrin, for appellee.

The objection is that the arbitrators did not sign in the presence of each other, not that the decision was not reached by the arbitrators at one and the same time in the presence of each other. The evidence shows that the decision was not only reached in the presence of all the arbitrators, but reduced to writing and signed by each arbitrator, before separation.

The mere signing of the award does not require the exercise of judgment or judicial discretion, and if what is signed does not vary from the conclusion reached, the signing of the arbitrators in the presence of each other is not necessary. 3 Cyc., 668; *Steer* v. *Brownell,* 113 Ill., 415; *Blodgett* v. *Frederick,* 7 Cush. (Mass.), 247; *Little* v. *Newton,* 9 Dowl. P. C., 437 (5 Jur., 246; 10 L. J. P. C., 88; 2 M. & G., 351; 2 Scott N. R., 159; 40 C. E. L., 637); *Goodman* v. *Sears,* 2 Jac. & W.,

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Brief for appellee.

249 (22 Rev. Rep., 112); *Williams* v. *Squaire,* 10 U. C. Q. B., 24.

The case of *Moore* v. *Ewing,* 1 N. J. Law, 167, is not opposed to these cases; the instrument signed separately as an award in that case required "reflection, deliberation and judgment and should have been approved jointly." The case of *Daniel* v. *Ripley,* 10 Mich., 237, cites *Moore* v. *Ewing* to support it.

It matters not, however, in this case, which line of authorities is followed. The award is good under either.

The reasons given in *Daniels* v. *Ripley, supra,* for the necessity of all the arbitrators to be present when the award is executed are, first, that "The award is the joint judicial act of all, at which all who sign it must be present to give their joint assent and second, that an agreement on the terms of an award to be afterwards drawn up and signed, is not binding on the arbitrators, who may at any time thereafter, before it has been signed by them, modify or change it to supply an omission, correct a mistake, or make it conform to any change of opinion that may have taken place on further or more mature consideration."

Now, in this case the arbitrators, after they have reached a decision before their separation, and in the presence of each other, reduced this decision to writing and signed it. They then separated, after being instructed, however, by the attorney for the appellant, to see Barnett and have him put the award in legal form. With this understanding the arbitrators separated. After their separation no change could have been made by the arbitrators in their decision. So far as the substance of the award went it became final upon the separation of the arbitrators. There was, then, a joint judicial act of all the arbitrators, and no change in the award proper could be made after the separation. The appellant by no subsequent act was deprived of any legal rights. The fact that the award was signed by the arbitrators separately, after it had been put in legal form

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by direction of counsel for appellant does not make it come within the condemnation of these authorities.

The objection that "The umpire, Lacey, was called in before the hearing of the case and before the disagreement of the arbitrators chosen by the parties and participated in the deliberation before the disagreement of the arbitrators," is without merit.

Lacey was called in before the hearing of the case under an agreement entered into by counsel for both parties and this was done, as the record further shows, to enable Lacey to hear the testimony so that he might be prepared to act if called on by the other arbitrators.

Certainly this procedure is not objectionable, no one could be harmed by it. If there was a departure from the submission, no objection was made but consent was given. 3 Cyc., 556, and cases cited in note 16; *Stevens* v. *Brown,* 82 N. C., 462; *Bryan* v. *Jeffreys,* 104 N. C., 242.

It will be insisted in support of this objection that the original finding is the award, and not the paper propounded as such.

A comparison of the paper propounded as the award and the original finding will show that no change in the decision was made. There is a change of verbiage, but otherwise the two writings, in this respect, are identical. The original finding was defective as an award in one particular, it did not recite that the parties appeared before the arbitrators, as is required by § 104 of the Code of 1892. The recital in the award propounded are statements of fact which are not controverted. The instruction to put award in legal form justified not only the preparation of the paper propounded as the award but justified the arbitrators in signing the same and treating it as their award. Appellant is estopped to say otherwise.

CALHOON, J., delivered the opinion of the court.

The oil company and Mrs. Buster had a controversy about their dealings, and agreed, in writing, to submit it to arbitra-

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tion, on the basis that "each party may select one arbitrator, and, in case said arbitrators cannot agree upon a decision, these said arbitrators may select a third person to act as umpire, and a decision, either by said arbitrators or by one of said arbitrators and said umpire, when so selected, shall be final and binding upon both parties." This instrument contained, also, a provision that the circuit court of the county should render judgment if the award should not be paid in thirty days. Accordingly the oil company selected E. S. Crane, and Mrs. Buster selected J. C. Hollingsworth, as arbitrators. These two, in order to save two hearings, agreed upon J. H. Lacey to be umpire if they should disagree, and all three were sworn in together, and all three sat together and heard the evidence pro and con; and all three signed the award as arbitrators, in the presence of each other, at the conclusion of the hearing. At this hearing both parties were present by attorneys, and, since they appeared, there is nothing in the idea that there was no notice served on them of the time and the place of the hearing. (Code 1892, § 98.) In fact, there was a full hearing in the presence of the parties, and the award was then and there written out and signed by the arbitrators in the presence of each other. It is in these words: "Yazoo City, Miss., July 1, 1903. We, the arbitrators in the case of B. W. Buster & Mississippi Cotton Oil Co., submitted to us for settlement, find that the Mississippi Cotton Oil Co. shall pay to B. W. Buster fifteen hundred and two and 50-100ths dollars, and shall credit the account on their books to J. W. Buster three hundred and twenty-three and 10-100ths dollars in full for the account in question. Total allowance $1,825.60. [Signed] J. C. Hollingsworth, E. S. Crane, J. H. Lacey."

It will be noted that this award does not, on its face, show that the parties appeared. But certain it is that the cotton oil company was represented throughout the hearing by Mr. Landau, of the firm of Smith, Hirsh & Landau; and he, with full knowledge of the actual award, directed the arbitrators

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to hand it to D. R. Barnett, Esq., the next day, to be put by him in form. This was done, the award put in proper form, again signed by the arbitrators, though on separate days, as each could be found, and Messrs. Smith, Hirsh & Landau duly informed. This firm made no objection, and do not appear in the attack made on the award, though furnished with a duplicate. This was enough. Mr. Landau, while he could not have agreed to a change in the number of arbitrators, as held in *Jenkins v. Gillespie,* 10 Smed. & M., 31 (48 Am. Dec., 732), had full power as attorney of the oil company, to direct that the award be put in proper form, with the substance of it unchanged. It is immaterial that it was not signed at the same time and place. *Steere* v. *Brownell,* 113 Ill., 415 (3 Cyc., 668).

We decline to sustain the contention that the award was void because the umpire was sworn with the arbitrators and sat with them during the taking of the testimony. The time to make that point was at that hearing, and the umpire took no part until called in by the arbitrators, when they failed to agree; and, if he had done so, there was no objection. *Estice* v. *Cockerell,* 26 Miss., 130.

We do not find in this record any evidence establishing any fraud, partiality, or unfairness. It was proper to refuse a question to an arbitrator in impeachment of his award.

Affirmed.

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Statement of the case.

RICHARD W. JONES v. SUNFLOWER COUNTY.

COUNTY. *Contracts. District attorney. Chemical analysis of stomach. Criminal procedure.*

A district attorney, in the absence of statutory authority, cannot by contract bind the county to pay for the chemical analysis of the stomach of a deceased person supposed to have been poisoned, although the analysis be a necessary aid to the enforcement of the criminal law.

FROM the circuit court of Sunflower county.

HON. A. McC. KIMBROUGH, Judge.

Jones, the appellant, a chemist and the professor of chemistry in the state university, was plaintiff in the court below; Sunflower county, appellee, was defendant there.

This suit was brought by appellant against appellee to recover the sum of $100 for making an analysis of a human stomach. There was a judgment in the justice of the peace court, in which the suit was originally begun, for defendant, from which plaintiff appealed to the circuit court. In the circuit court the case was tried before the court on an agreed statement of facts, a jury being waived. The facts are that on November 25, 1900, the district attorney of the circuit court district which embraced Sunflower county employed, with the consent and approval of the court, plaintiff, Jones, to make an analysis of a human stomach, and agreed to pay him therefor $100. The stomach in question was that of a person who was thought to have been murdered by poison and the district attorney caused the analysis to be made as an aid to the enforcement of the criminal law. The analysis was made, and an order was entered by the court allowing the account and approving it, directing the treasurer to pay it out of the common county fund. The treasurer refused to pay it unless it was allowed by the board of supervisors. It was presented to the board, and

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Brief for appellant.

disapproved by it and disallowed. Thereupon this suit was begun.

D. M. Quin, and *M. H. Brown,* for appellant.

It stands as unquestioned that the circuit courts must do all within their powers to bring criminals to justice, and the district attorney and the court were merely trying to meet the emergencies of the moment as they arose, in order that they might give justice to all as justice was due.

The case is simply this: A woman dies, and there is reason to suspect her husband has murdered her; poisoned her. It was necessary to have the stomach examined in order to acquit the innocent or convict the guilty. Time was a great factor in the case. It was necessary to have the analysis made as soon as was possible. Some one surely had the right to have the work done, and if it was not in the power of the presiding judge and the district attorney, those officers of the law in whose hands are held the very keys of justice, we cannot imagine to whom this power is granted. Can it be possible that they must wait until something or some one brings forth the evidence that is to make or overthrow a suit in which the public is so much concerned? Does our law contemplate any such thing? We cannot believe it! Surely it was in the power of the district attorney and the court to have this analysis made, and there is no right-thinking man who does not feel that it is unjust to withhold from the chemist the remuneration that ought to be his after he has faithfully completed the work for the public that was assigned to him by public officers. Public policy and absolute necessity demands that such debts be paid, and we look to our supreme court to remedy such errors as that made by the board of supervisors.

In support of this cause we cite you a case sent up from Yazoo county: *J. W. Cain* v. *Yazoo County,* which case is as near in point as can be found, and in our estimation fully supports the case under consideration.

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Opinion of the court.

Johnson, Chapman & Neill, for appellee.

In this state there is no law, either statutory or common, of which we have any knowledge, which would authorize the board of supervisors to pay the bill for which the plaintiff has sued. The services were rendered in making an autopsy. We know of no authority on the part of the circuit judge or district attorney to bind the county for a bill for making an autopsy. We do not think the question of public interest or public policy will answer the want of direct authority. With the same propriety the circuit judge and district attorney might employ the services of experts to give testimony in criminal cases. We know of no authority for paying for this kind of services, and we submit that the judgment of the lower court should be affirmed.

CALHOON, J., delivered the opinion of the court.

We know of no statute enabling a district attorney to bind a county by his contract with a chemist to make an analysis of the stomach of a corpse suspected to have been poisoned. In the particular case we wish there was such a statute. In the absence of it, courts cannot order an appropriation of public money. The case of *Yazoo County* v. *Cain* (affirmed Oct. Term, 1901) is not relevant. Cain's claim was based on Code 1892, § 4138, for guards for the jail.

Affirmed.

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Brief for appellant.

VINCENT E. ROWE v. WILLIAM D. CANNON.

1. CIRCUIT COURT. *Justice of the peace. Appeal. Notice.*

Upon appeal from the judgment of a justice of the peace to the circuit court it is unnecessary to give notice of the appeal to the adverse party.

2. SAME. *Code* 1892, §§ 82, 84.

The execution of the appeal bond in such case, as required by Code 1892, § 82, and the transmission of the record to the circuit court, as required by Code 1892, § 84, has the effect of continuing the pendency of the suit.

3. SAME. *Code* 1892, § 3417.

Code 1892, § 3417, providing for the issuance of a summons upon the institution of a suit in the circuit court, has no application to a case appealed from a justice of the peace.

FROM the circuit court of, second district, Bolivar county.

HON. A. McC. KIMBROUGH, Judge.

Cannon, appellee, was plaintiff in the court below, and Rowe, appellant, was defendant there. The suit was begun in a justice's court where a judgment after a trial was rendered in defendant's favor. From this judgment the plaintiff, Cannon, duly appealed to the circuit court. When the case came on for trial in the circuit court, Rowe, the defendant, was not present and a judgment in plaintiff's favor was rendered against him, from which he appealed to the supreme court.

Sillers & Owens, for appellant.

The circuit court has jurisdiction in appeals from justice courts when appeal bond, the original papers, and certified copy of the proceedings of the justice are filed, as it has jurisdiction in other cases when declaration is filed, but the court cannot render judgment in either case until the defendant has

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notice by proper summons legally executed. Code 1892, § 3417, requires summons to be issued in actions in that court.

By actions it is meant any action filed in that court whether by declaration, petition, appeal or otherwise, and the failure to have summons issued for appellant when the appeal papers were filed in the circuit court and have said summons properly executed upon him will make void any judgment rendered by the circuit court.

An appeal from a justice of the peace to the circuit court is tried *de novo,* and to permit one party to appeal his case to the circuit court and proceed there without any notice to the opposite party would be violating sec. 14 of the constitution, which provides that "No person shall be deprived of life, liberty, or property except by due process of law." In support of this, we refer the court to *Jack* v. *Thompson,* 41 Miss., 49.

Moore & Clark, for appellee.

An appeal from the judgment of a justice of the peace to the circuit court is perfected upon the filing and approval of an appeal bond as required by Code 1892, § 82.

Upon approval of the appeal bond the magistrate must certify the record to the circuit court. Code 1892, § 84, the case is then tried *de novo* in circuit court without pleadings in writing at the first term, unless upon cause shown to the contrary. Code 1892, § 85.

CALHOON, J., delivered the opinion of the court.

The bond having been given by plaintiff for appeal to the circuit court from the justice of the peace (Code 1892, § 82), and the certified copy of the record, with the original papers and process and original appeal bond, being sent up to the circuit court (Code 1892, § 84), the case stood for trial *de novo,* without new process to the appellee in that court. None was necessary, because no statute requires it. The case did not stand as a new action, requiring "due process of law." It was,

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Brief for appellant.

by the appeal, still a pending action, requiring no process additional to that before the justice of the peace. The judgment by default in the circuit court was proper.

Affirmed.

CONTINENTAL NATIONAL BANK OF MEMPHIS *v.* FIRST NATIONAL BANK OF WEST POINT.

BANKS AND BANKING. *Collections. Unlimited indorsement. Insolvency. Right to proceeds.*

A bank receiving checks drawn on it from its correspondent bank, payable to a third bank which had indorsed them in blank, has the right, being ignorant of its correspondent's insolvency and of the the fact that it held the checks only for collection, to credit the sums drawn for to its correspondent from whom it received the checks in accordance with the course of uniform dealings between them, and is not liable to the payee in the checks who had sent them for collection to the correspondent bank, since the payee bank by its unlimited indorsement had divested itself of ownership of the checks.

FROM the circuit court of Clay county.

HON. WILLIAM F. STEVENS, Judge.

The Continental National Bank of Memphis, Tenn., appellant, was plaintiff, and the First National Bank of West Point, Miss., was defendant in the court below. From a judgment in defendant's favor the plaintiff appealed to the supreme court. The facts are fully stated in the opinion of the court.

Leory Percy, for appellant.

As said by Daniel, in his work on Negotiable Instruments, sec. 1635:

"The question whether or not the holder of a check may sue a bank holding funds of the drawer, upon its refusal to pay,

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has divided the opinions of the courts and jurists, and no little perplexed the legal profession."

Or, as said by Morse on Banks and Banking, vol 2, sec. 493:

"Authority is as divergent as the rays of the sun."

The divergent authorities, and the reasoning supporting the conflicting instructions, seem to me to be admirably and succinctly collated by the last named author.

After setting forth the authorities, pro and con, on the subject and unhesitatingly indorsing and commending those upholding such right of action in the holder, this author concludes:

"We hope that it will not be many years before it will cease to be possible to find this blot on the common law. No amount of deciding in the United States Supreme Court, nor in any other chamber of wisdom. can make the unjust just. And as certainly as the Dred Scott decision is dead, so truly will the decision in the *Bank of Republic* v. *Millard* die with the judges who rendered it."

As said by this author, it seems to me to be clear that all of the advanced thought of the age favors giving the holder the right to sue, and the best text writers on the subject, while admitting that the weight of decisions is to the contrary, unhesitatingly, after analysis and considering the reasons upholding such decisions, repudiate them. Daniel on Negotiable Instruments, secs. 1635-6142, inclusive, and authorities there cited; *Simmons Hardware Co.* v. *Bank of Greenwood,* 41 S. C., 177 (s. c., 44 Am. St. Rep., 700); 5 Am. & Eng. Ency. Law [2d ed.], 1061, *et seq.*

The position that when the bank has unincumbered in its possession sufficient to pay the check, that it is its duty to pay it, and that it is bad faith or negligence on its part not to pay it, by which the check holder is directly injured, and that such injury constitutes the basis of a right of action, seems to us founded in justice and right and to be impregnable, and we

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commend to the court especially sec. 499 of Morse on Banks and Banking.

The principal answer relied upon is lack of privity between the holder of the check and the bank. This is technical purely, and technically unsound. The fundamental question to be passed upon, is, can a party for whose benefit a contract is made, although he be no party to such contract, sue upon it?

And, as said by the supreme court of this state, in *Lee* v. *Newman,* 55 Miss., 365: "In America, it has been held that such promise is to be deemed made to the third party, if adopted by him, though he was not cognizant of it when made. In law, the promise is held to be made to him to whose benefit it inures." Daniel on Negotiable Instruments, sec. 1639, note 1.

There is no hardship and there can be no injury inflicted upon any one by holding that a bank should comply with its duty, and pay a check when presented to it, drawn by a depositor who has funds in the bank sufficient to pay it, and that upon the failure to pay such check the parties who are injured by this breach of duty are entitled to recover for the damage done them, whether such parties be the holder or the drawer of the check.

The pregnant facts are that appellant forwarded to the American National Bank of New Orleans, La., thirteen checks, aggregating $1,381.91, drawn on the First National Bank of West Point, Miss., for collection and remittance; that said checks were received by the American National Bank when it was, and had been for a long time, to the knowledge of its officers insolvent, and these checks were forwarded to the Bank of West Point, upon whom they were drawn, with this letter:

"We inclose for collection and remittance items, as stated below. Unless otherwise instructed, protect all items not paid or accepted, and return at once."

These checks were collected by the appellee, and, as stated in the specific pleas, would have been remitted, but for the fact that after collection, and before remittance, appellee was

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Brief for appellee.

advised that the American National Bank had closed its doors, and thereupon credited the account of the American National Bank with the proceeds of the checks.

The question, stripped of useless verbiage, simply is: "Has the West Point Bank the right to reduce the indebtedness now owing to it by the insolvent American National Bank by appropriating money belonging to this appellant to the account of the American National Bank?"

There is no similarity whatever between this case and that of *Billingsley* v. *Pollock*, 69 Miss., 759. There, the money had been collected by an insolvent bank, and indistinguishably mingled with the assets of that bank, and it was impossible to say whether such money passed into the hands of the receiver of the insolvent bank or not. It could not be traced into the receiver's hands. The case would have been analogous to this case, if the collection had come into the hands of the bank after the appointment of the receiver, and, unquestionably, the court would have held that the receiver held same as trustee for the owner.

A correspondent bank can only claim a lien upon commercial paper, or its proceeds, to the extent of any credit given to the remitting bank, upon the presumed ownership of the paper. Zane on Banks and Banking, sec. 175, p. 298.

Even where the indorsement upon paper is a general indorsement, a correspondent bank can only hold it for the debt of the remitting bank, when it has given credit upon this particular piece of paper, or has a lien by agreement, by a course of dealing between the banks. Zane on Banks and Banking, sec. 190, p. 323.

Critz, Beckett & Kimbrough, and *Roane & McClellan,* for appellee.

Where the bank received the check of its depositor, who has funds in it sufficient to pay the draft, the draft is paid, there is no lien on the amounts in the bank, and no way of identifying

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the fund, and the same is untraceable, and cannot be recovered either at law or in equity, against the bank which has credited the same on the account of its correspondent. *Billingsley* v. *Pollock,* 69 Miss., 761; *Citizens Bank* v. *Bank,* 71 Miss., 271; (1 Daniel Neg. Ins. Co., 336; Morse on Banks and Banking, secs. 493, 175, 186, 189, 190, 3 Banking Cases and American notes, 244, 246); *State Bank* v. *Yanley,* 165 U. S., 634.

The general rule is that one bank has a lien on securities of another bank sent to it for collection for advances due from such a bank in preference to all other liens. I Daniel Neg. Inst., secs. 336, 340.

While the statute of Mississippi is commonly designated as an anti-commercial statute, it must be remembered that the contract of drawer, indorser and acceptor are all separate and distinct contracts, and each is governed by the law of the place where made. The indorsement in this case was made in Tennessee, and is governed by the law of Tennessee, but whether governed by the law of Tennessee or Louisiana is immaterial, both being the same. 1 Daniel Neg. Inst., secs. 889, 902; *Crabeau* v. *Sgort,* 1st (Cold.) Tenn., 293; *Lowry's Admr.* v. *Western Bank,* 7 Ala. (N. S.), 120; *Dugan* v. *Sparrow,* 3 Ky., 167; *Murrell* v. *Jones,* 40 Miss., 565; *Rawlins* v. *Poindexter,* 14 Smed. & M., 66 (George's Dig., 85, sec. 134).

It is distinctly admitted that this is the rule in Mississippi, in all cases where the contract is not governed by our anti-commercial statutes. *Bank of Meridian* v. *Strauss,* 66 Miss., 482.

TRULY, J., delivered the opinion of the court.

Appellant was the owner of eleven checks, aggregating $1, 318.91, drawn prior to Julv 31, 1896, on appellee, by parties, all depositors with appellee, in amounts in excess of their checks. These checks were by appellant on said July 31st sent to the American National Bank of New Orleans, La., for collection and remittance, each check being indorsed, "Pay to the

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order of any State or National Bank." The American National Bank at the date of the receipt of these checks was, and for some months prior thereto had been, to the knowledge of its own officers, but without the knowledge of appellant or appellee, utterly insolvent. On August 3d the American National Bank sent these checks to appellee, upon whom they were drawn, for collection and remittance. On August 5th they were collected by the appellee, and would have been remitted to the American National Bank, but at 3 P. M., on August 5th, the American National Bank closed its doors and passed into the hands of a receiver, whereupon, the appellee hearing of such failure before making remittance to cover said collection, credited the proceeds thereof to the account, on its books, of the American National Bank. The appellee had no knowledge at that time that the checks were the property of appellant, and received same under the general indorsement as stated. The American National Bank had been for some time prior to its failure the New Orleans correspondent of appellee, and at the date of its failure was indebted to appellee in the sum of $20,000. Appellant sued for the amount of the checks in question, claiming that, as the American National Bank was at the date of its receipt of the checks utterly insolvent, therefore it had no right to receive such checks for deposit, and such action was fraudulent, and revoked its employment by appellant as agent; wherefore it is averred that appellee became the agent of appellant, and liable to account to it for the proceeds of the checks. On behalf of appellee it is contended that, as the checks were received under a general indorsement, it was entitled to consider them as the property of the American National Bank, and, having no information of any claim of appellant, had the right to dispose of the proceeds in accordance with the course of business dealings existing between appellee and its correspondent, the American National Bank.

The precise question here presented has never been passed upon or considered by this court, and the authorities and the

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courts of last resort of the various states are in hopeless conflict. After careful consideration and review of the legal principles applicable, our conclusion is: Where a bank forwards checks for collection under a general indorsement in blank, the title to such collection, as to third parties dealing without notice, and not being put upon inquiry, passes to the bank to which they are forwarded, and the initial bank becomes simply a general creditor of the bank to which the items are sent for collection. So where in turn the second bank sends such items under a like indorsement in blank to its correspondent for collection, the same relationship is established between them, and the bank finally making the collection has the right to apply the proceeds thereof in any manner that may be authorized by the mutual understanding and course of dealing previously existing between it and the bank from which the items were received. The collecting bank is not required to make any inquiry to ascertain who, in point of fact, is the real owner of the proceeds of the collection, where the items for collection are received under a general indorsement. It has the right to assume that the ownership is in the bank forwarding the item to it. *American Exchange National Bank* v. *Theummler,* 195 Ill., 90 (62 N. E., 932: 58 L. R. A., 51; 88 Am. St. Rep., 177). Any other rule would render it impossible for the bank making a collection to protect itself unless the remittance was in all cases made to the payee named in the check, and this would often be not in accordance with the real rights of the parties in interest. Where a bank collects checks received under a general indorsement, and remits the proceeds to the bank from which the items were received, it has discharged its whole duty in the premises, and the initial bank must look to its correspondent for payment; and when, by the course of dealing or understanding, the bank making the collection has the right to apply the proceeds of such collection to the credit of the bank from which the items were received, and upon making the collection does make such application, this is likewise a full discharge of its

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duty, and the initial bank has no right to hold the collecting bank for the proceeds of the collection. The possession of the checks by the American National Bank under a blank indorsement was presumptive evidence of its ownership, and appellee, not being in any manner advised of appellant's claim, and not placed upon inquiry, had the right to consider the checks as the property of the American National Bank, and to dispose of the proceeds according to the course of dealing existing between them. The right of appellee to deal with the proceeds is not affected by the fact that the American National Bank had been for a long period insolvent. The collection was fully completed, the money actually received by appellee, and its rights thereby established and fixed, before such insolvency was disclosed. Nor is the controlling legal principle different because no advances were made by appellee on this particular collection. The American National Bank was the regular correspondent of appellee, keeping accounts and deposit balances with each other to draw against in the regular course of business. This collection was received in the usual and customary course of business, and in accordance with such custom was, before such failure, duly credited to their mutual running account. *Bank of Metropolis* v. *New England Bank,* 1 How. (U. S.), 234 (11 L. ed., 115); *Same* v. *Same,* 6 How. (U. S.), 212 (12 L. ed., 409); *Doppelt* v. *National Bank,* (Ill.) N. E., 753; Zane, Banks and Banking, secs. 187, 188; *Commercial National Bank* v. *Armstrong,* 148 U. S., 58 (13 Sup. Ct., 533; 37 L. ed., 363); 2 Morse, Banks and Banking, secs. 591,592. In the instant case the appellant, by forwarding these collections under a general unlimited indorsement, divested itself absolutely of all ownership, and retained simply the right to look to its correspondent, the American National Bank, for payment; and when the American National Bank, without restricting or limiting such indorsement, sent the same to its correspondent, the appellee, it in turn divested itself of all ownership in the items, and could only look to the appellee for settlement in accordance with the

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established course of dealing between them. The record here discloses that under the uniform course of dealing existing between appellee and the American National Bank, the appellee had the right to apply the proceeds of all collections to the credit of the American National Bank, and, as it did so apply the proceeds of these special items without knowledge of any claim on the part of appellant, it was strictly within its rights, and cannot now be made to again account for the proceeds of collections which have already been credited to the account of the American National Bank.

It is not necessary for us to decide what remedy, if any, the holder of a check drawn by a depositor on a bank in which he has sufficient funds to pay such a check may have against the bank on which the check is drawn. That point is not presented for decision by the record here made, for the reason that appellant divested itself, as to third persons without notice, of all ownership by its general and unlimited indorsement and subsequent forwarding to its own correspondent, and its only right in the premises is that of a general creditor of the American National Bank. *Citizens' Bank* v. *Bank of Greenville,* 71 Miss., 271 (14 So. Rep., 456): *Brewing Ass'n.* v. *Clayton,* 56 Fed., 759 (6 C. C. A., 108).

For these reasons, on the facts set out in the special pleas of appellee, appellant has no cause of action. Wherefore the judgment is affirmed.

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Statement of the case.

HARPER MOREHEAD v. YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

1. RAILROADS. *Custom. Contributory negligence.*

The custom of a certain train to use the main line of a track at a station does not deny it the right to use a side track, or excuse any person walking on the side track when such train is approaching, for a failure to exercise ordinary care.

2. SAME. *Station agent. Walking on track. Assumption of risks.*

A station agent assumes the risk incident to his acts when he goes upon a side track, rather than the space provided for pedestrians between such track and the main line, while walking to the point where he transacts business with trains.

3. SAME. *Engineer. Man on track. Presumption.*

The engineer of a railroad train has the right to assume that a man seen on the track, at a place where there is no difficulty in leaving it, will exercise the common instinct of self-preservation and get off the track before he is reached by the train. *Railroad* v. *Stroud*, 64 Miss., 784, and *Christian* v. *Railroad*, 71 Miss., 237, approved.

FROM the circuit court of Claiborne county.

HON. GEORGE ANDERSON, Judge.

Morehead, appellant, was plaintiff, and the railroad company, appellee, defendant in the court below. From a judgment in defendant's favor the appellant appealed to the supreme court.

Appellant had been station agent at Ingleside for sixteen years. The depot there was on the east side of the railroad track. There was a side track on the east side of the main line, and next to the depot. The space between the two tracks is nine feet wide, and level, and was used by pedestrians. Appellant was injured by being struck by a passenger train going south on the morning of April 23, 1902. The testimony showed that plaintiff had been in the habit of walking down the center of the side track for some distance south to a point where the

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Statement of the case.

baggage cars of southbound passing trains stop in order to get the mail and express; that passenger trains usually and nearly always kept the main track, and that the rules of the company required all work trains and irregular trains to give the right of way to the regular passenger trains. On the morning of the accident, plaintiff was sitting in the depot writing, and expecting the southbound passenger train. He heard the train whistle, and at once started to go down the center of the side track, to the place where it was his custom to go in order to transact his regular business with the trains. The passenger train, instead of going down the main line, as was usual, took the side track, because there was a work train on the main line, and just as plaintiff reached the point he expected to stop, the train overtook him and struck him, fracturing his spine and causing paralysis of the lower limbs. Plaintiff did not look north at all; he was accustomed to that train coming on the main line, and not on the side track; he did not have to go the way he did, but it was the most convenient way; he had no notice that the train would come in on the side track, and did not know that there was a work train on the main line; took it for granted that the passenger train was on the main line; was relying on the rules of the company, requiring other trains to give the main line to the regular passenger trains. Plaintiff's brother was walking just behind him, and got out of the way of the train, and was not injured. Plaintiff could easily have seen the train in time to have gotten out of the way if he had looked up. Plaintiff's evidence, when he rested his case, was excluded, and a peremptory instruction granted by the court to find for defendant. To this action of the court plaintiff excepted, contending that it was the invariable custom of the defendant company, continued through many years, to bring in its southbound passenger trains on the main line, and that it was the rule of the company to require other trains to give the right of way to passenger trains, and that it was negligence on the part of the railroad company to bring the train on the side track on the

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Brief for appellant.

morning of the accident without sending a flagman ahead to give warning; and that, notwithstanding the carelessness, inattention, and negligence of the plaintiff at the time of the injury, still his position on the track was one of danger and peril, which was easily apparent to the engineer, who failed to use reasonable care to avoid the injury.

J. McC. Martin, and *McLaurin, Armistead & Brien,* for appellant.

In their relations to others, respecting the degree of care required of them to prevent injuries, the courts lay down the following rules, to wit:

1. As to trespassers, they owe no duty, unless their peril be seen, then they should use all reasonable effort to prevent injury. Having done this, then they are blameless. *Railroad Co.* v. *Watley,* 69 Miss., 145.

2. As to trespassers when the engineer is made aware of their peril, and he willfully, wantonly and recklessly hurts them, then the company is liable. *Railway Co.* v. *Williams,* 69 Miss., 631.

3. As to licensees. They owe the duty of ordinary care; and should injury result in the absence of ordinary care they are liable. *Law* v. *Mo., Kan. & Tex. Ry.,* 20 Railroad Rep., 588 (s. c., 67 S. W. Rep., 1028).

The Arnola case, 78 Miss., 787, does not contravene the above rule. Arnola was not a licensee, because no inducements had been held out by the company to her or the public to use the pass way at Crystal Springs, over the company's lot. Hence, in that case the rule as announced by the court: "A person who, without the invitation of the owner, goes upon the land or premises of such owner, takes such permission with all the dangers attending it." Had she been there as a licensee, by the invitation of the company, the rule would clearly be as first above stated. Such, also, is the case of *Dooley* v. *R. R. Co.,* 69 Miss., 648. In that case, the court says: "It is the plain case

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of an inattentive person using the track of a railway, where he had no right to be, and where the company had a right to expect an unobstructed way at all times, and in such manner as to absolve others from all liability from any injury, short of willful and wanton injury, that may occur."

In the case of *Bell* v. *Southern Ry. Co.*, 30 So. Rep., 821, a Mississippi case, not reported in the Mississippi Reports, the facts developed and the rule applied were as follows: "The plaintiff was unloading coal from defendant's car on its side track, placed there for that purpose. After satisfying himself that no engine was attached, plantiff backed up his wagon, and while so doing his team became frightened and he stepped in front of them. At that moment he heard the engine hit the train, and the coal car struck the wagon, frightening the team so that they ran over plaintiff. He could not see the engine before the collision and received no warning from the defendant's servants." Held, "As the plaintiff was at the car, on the implied invitation of the defendant, defendant's negligence and plaintiff's contributory negligence were questions for the jury."

4. As to persons on track or premises by invitation. Of this class are passengers, and others, using crossings prepared by the company for public convenience. The case of *Railway Co.* v. *Hirsch,* 69 Miss., 132, is of this character. Says the court: "Where a railroad company so locates its station as to require persons approaching it from the main business portion of the town, to cross several tracks which are kept smooth for pedestrians and without any well defined crossings, this is tantamount to an invitation to such persons to cross at any point near the station, and persons so crossing are not trespassers. And under such circumstances the company will be held to the utmost caution in the movement of its trains on such tracks to prevent injury to persons so crossing."

The case of *Railroad Co.* v. *Turner,* 71 Miss., 404-406, is to the same effect. Plaintiff was carrying away his purchases

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Brief for appellant.

from a trading car, where it had been placed by the company, and to which the public resorted.

5. As to employes and persons charged with fixed duties. The rule is the same as that for persons on track or at stations by invitation. Their obligations to the employer requires that their attention should be engrossed in the performance of duty. Hence, their minds and attention, being engrossed in performance of the duty, they have not the same opportunities and freedom to look out for danger as a licensee, or passenger. The courts recognize this and require from the employer a higher degree of care to avoid injuring such employes.

In the case of *Bullard* v. *Southern Ry. Co.,* 6 Railroad Rep., 609, a Georgia case (43 S. E. Rep., 41), the doctrine is announced: "Railroad engineers should observe more caution in running at places where they know persons are likely to be on the track than elsewhere, even if those persons are trespassers, and especially is this true when the company has at least tacitly consented to this otherwise unauthorized use of its property by the public."

In the case of *Ala. Great Southern R. R. Co.* v. *Brooks,* 6 Railroad Rep., 375 (33 So. Rep., 181), the rule is stated: "Employes do not assume risks created by the employer's negligence." Again, in the case of *Boggero* v. *South. Ry. Co.,* 4 Railroad Rep., 386 (41 S. E. Rep., 819): "A railroad company owes a greater duty to one on the railroad track with its consent or permission." So, in the case of *Klien* v. *Jewett,* 5 Neg. Cases, 1: "The plaintiff, in attempting to pass from the depot to the cars, in the absence of warning, has a right to regard himself in a place of safety, where he had a right to give his whole attention to the business he had in hand, and was not bound to look out for extraordinary dangers occasioned by negligence of persons in charge of the road."

Employes on track—in general. "The general rule is that, as to persons lawfully upon the track engaged in labor, the railroad company owes a duty of active vigilance, and such

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persons have a right to become engrossed in their labor to such an extent that they may be oblivious to the approach of trains—relying, as they may, upon the duty imposed by law with reference to them." See notes admirably digested, in vol. 4, New Series Am. & Eng. R. E. Cases, p. 542.

"Where workmen are placed upon the track by a railroad company to do work, the company must be as to them actively vigilant. Such persons have a right to become engrossed in their employment and to expect that care and pains will be taken as to them." (See same notes last above cited.)

"Where a railroad employe, engaged in moving ashes, etc., from a side track in depot grounds, was injured by a train set off upon said track, held that he had a right to act upon the belief that such train would be operated and run through the grounds as other trains had been uniformly operated and run there." *Schultz* v. *Chicago, etc., R. R. Co.,* 44 Wis., 638.

"The fact that the deceased, when he engaged in the company's service, assumed the risk of injuries from the negligence of his co-employes, did not relieve the engineer of the duty of looking out for and avoiding injury to deceased." *Schlereth* v. *Missouri Pac. R. R. Co.,* 115 Mo., 87; *Erickson* v. *St. Paul, etc., R. R. Co.,* 41 Minn., 500.

"A master is as responsible for injuries caused by his negligence in not informing his servants of danger known to him, and not known by the servant, as he is for injuries caused by the personal negligence of the servant." *Mitchell* v. *Boston, etc., R. Co.* (N. H.), 34 Atl. Rep., 674.

Upon the question of usage and custom. In the case of *Pier* v. *Chicago, M. & St. P. R. Co.,* 5 Am & Eng. R. R. Cases, 412 (94 Wis., 364, 365), the court says: "The custom which plaintiff attempted to prove was simply a customary way of doing certain things prevailing in the switch yard, which, if proven, would be a fact proper to be considered in connection with the other surrounding facts in judging of the conduct of defendant and the plaintiff."

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Brief for appellant.

"Persons lawfully at work in repairing a railway track, cannot be expected to pursue their labors and at the same time maintain a constant lookout for an approaching train. They are passive and not a source of danger to the train. Those who are driving the train are active, and are handling and are in control of the instrument of danger and mischief. The obligation of reasonable care which the law puts upon the railway company under these circumstances therefore demands nothing less than an active vigilance in favor of persons thus lawfully at work, and the giving of reasonable danger signals to arouse their attention and enable them to get out of the way before it is too late." 2 Thompson's Neg., sec. 1859.

"In secs. 1840-1842, *Ib.*, it is shown that the same rule applies in favor of the servants of a contractor, or persons engaged in loading or unloading cars, or receiving mail or express matter."

In the case of *Louisville & N. R. R. Co.* v. *Lowe*, 1 R. R. R., 364-370 (66 S. W. Rep., 736), "Lowe was an assistant inspector of cars for defendant. He had just finished inspecting one train and was on his way to a tool house, where his duties next called him. The train he had just inspected was pulling out on another track. He walked alongside of the pulling out train, and finally stepped onto the main track. While he was walking southward on the main track, towards the tool house, his next place of duty, an engine and tender ran upon him from behind. Says the court: 'The appellee was in the discharge of his duties in going from the inspection of the train to the tool house, and was at a place where the presence of persons on the track might be anticipated. While he was not at work on the track, he was at work for defendant, and was lawfully on the track in the course of his employment, and is as much within the principle of the rule as if laboring on the track. Whether he was guilty of contributory negligence was a question for the jury, and it was, also, properly submitted to the jury whether, notwithstanding his negli-

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gence, those in charge of the train, after they perceived his danger, or should have perceived it by the exercise of ordinary care, might not have avoided the injury to him.' "

"In the case of *R. R. Co.* v. *Mahan* (Ky.) 34 S. W., 16, Mahan was the telegraph operator, and received orders to stop an extra train. It disregarded his signal to stop, and he, seeing that a collision was inevitable with a passenger train coming in the opposite direction, unless the order to stop was obeyed, seized a lantern and followed the train, waving his light. It stopped and the conductor came back to him. The extra then backed in off the main track to get out of the way of the approaching passenger train, and they, also, got off the main track to let that train pass. In doing this they got on the side track, and while standing there, the train which he had stopped continued backing down on the side track without any lookout or signal of its approach, and ran over him. Says the court: 'If in the emergency which seemed to confront him, the appellee got on the side track or too close to it, when there was space elsewhere within which to stand or walk and give his signals to the approaching train, he was, perhaps, guilty of negligence, but for which the injury would not have occurred. Yet it is manifest that by the exercise of ordinary care on the part of those controlling a backing train the danger could have been discovered and the danger averted. The necessary care was not exercised on this occasion, and the failure to exercise it was gross negligence.' "

From the foregoing citations it is clear that appellee was not entitled to a peremptory instruction in the case at bar, and that the evidence for plaintiff showed a line of facts such as entitled him to go to the jury. Appellee had established a particular method of dealing at Ingleside. It had knowledge of appellant's manner and practice of approaching its southbound passenger train. Besides it used well-ascertained rules for managing the trains at that point. For sixteen years its train southbound, due there at 8:15 A. M., had passed on the main line ex-

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Brief for appellee.

clusively, and never on the side track. Thus usage and custom had created a condition of things well known to the engineer, fireman and superintendent of appellee. Upon this condition of things appellant relied implicitly. *Betts* v. *Lehigh, etc., R. R. Co.* (Penn.) 6 Am. Neg. Rep., 393 (s. c., 191 Pa. St., 577); *Chicago, etc., R. R. Co.* v. *Kelly,* 182 Ill., 269 (s. c., 6 Am. Neg. Rep., 489).

Mayes & Longstreet, and *J. M. Dickinson,* for appellee.

It was in no sense negligence on the part of the company to bring in its trains on a side track whenever the exigencies of its business demanded such use. Side tracks are the property of the railroad companies, and built for their uses as much so as the main lines. They are used at stations for passing trains, for switching purposes, for unloading tracks. Plaintiff admits such uses and knowledge of them. There is no statute of the state which forbids any proper use of side tracks, or which attempts any regulation of such use. There is no rule of the company whch prohibits the use of such tracks whenever the business of the company requires them to be used.

The mere fact that a railroad company has not used a certain portion of its track at a certain hour for the passing in a certain direction of a certain character of train, cannot be held to bar the company on any idea of non-user, abandonment or prescription, when the particular track remains throughout the whole period the property of the company, as a part of its necessary equipment in constant use, and open at any moment of the time to any use for any train which the business exigencies or conveniences of the company may render proper. *Hackney* v. *R. R.* 33 So. Rep., 723.

In view of the great emphasis laid by plaintiff in his testimony and by his attorneys upon the supposed rights of precedence and priority between trains termed "superior" and those termed "inferior," we desire to say that the regulations do not by any fair construction declare as a rule which may not be

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Brief for appellee.

varied or departed from, that superior trains shall always use and remain on the main line, and that inferior shall invariably go to side tracks. Plaintiff refers in his testimony, time and again, and learned attorneys in their briefs treat, the rule in regard to the passing of superior and inferior trains as if it were an invariable, inviolable imperative, inflexible regulation—the very breach of which was negligence.

But such a contention is not supported by an inspection of the rules themselves. There was no breach of duty, rule or custom on the part of the railroad or of the employes in charge of its train, growing out of the use of the side track by the passenger train under the circumstances shown by the testimony.

The use of its side track being lawful and proper, it was not negligence to so use it, and there was no rule or necessity which required extraordinary warnings or precautions. The train entered the station under full control; the bell was ringing and giving warnings; the speed (which plaintiff asserts "was at high rate"), the proof shows was about ten miles an hour, and there was no dangerous rushing into the station, but a moderate and prudent progress, with such a slowing down that the engine came to a dead stop seventy-one feet south of the southwest corner of the station, and less than fifty feet from the point where plaintiff was struck.

Plaintiff was "bound to the use of his senses, and could not, whilst plainly discarding their use, recover on the ground that appellant had violated its rule (or custom), such violation not being willful, but merely negligent." *Railroad* v. *Crockett,* 78 Miss., 412.

In this connection we call the attention of the court to the facts and to the opinion in the case of *Hackney* v. *Railroad Co.,* Miss., 1903 (33 So. Rep., 723), where the plaintiff attempting to cross a spur track, little used by the railroad company, and where he had no special reason to expect a train, was struck by a train and killed:

"He never stopped to look for a train, for if he had done

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Brief for appellee.

so, he must have seen the train plainly approaching him from his left and rear. The company was negligent in not keeping a lookout where deceased was killed, but deceased was guilty of contributory negligence that bars a recovery."

The plea of contributory negligence is not answered by showing failure of duty on the part of the railroad company. That defense itself assumes the existence of negligence on the part of the injured person. *R. R. Co.* v. *Webb,* 90 Ala., 185; *Sala* v. *R. R. Co.,* 85 Iowa, 678; *Freeman* v. *R. R. Co.,* 74 Mich., 86; *Duncan* v. *R. R. Co.,* 46 Mo. App., 198; *R. R. Co.* v. *Mathis,* 50 Ind., 65; *Bridge Co.* v. *Sanson,* 91 Ala., 560; *Taylor* v. *R. R. Co.,* 86 Mo., 457.

The second proposition advanced by plaintiff to save himself from the effects of his own gross carelessness and inattention, is, that his position at the time he was injured was one of peril apparent to the engineer, who did not then use reasonable effort to avoid striking him. Plaintiff was not in a place of peril apparent to engineer or fireman. The court will remember that the evidence showed that Ingleside is only a wayside stop, where the total number of passengers for all trains do not exceed fifty or sixty persons per month. So far as the evidence discloses, it was little more than a plantation stop, with one store, and that on the morning of the injury there were few persons around the station, and no persons intending to become passengers. There was no reason why the engineer should have anticipated a crowd at such point, and it is apparent from the evidence that only three or four persons, and they, with one exception, employes, were at the point at the time. However this may have been, the fact still appears that the engineer had his train under perfect control, and was going into the station at a slow rate of speed, and did, in fact, bring the train to a dead stop seventy-one feet from the southwest corner of the station.

The rule imposing an obligation upon the employes in cases of "discovered peril" is clearly stated by our court in the cases

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Opinion of the court.

of *Christian* v. *Illinois, etc., R. R. Co.*, 71 Miss., 240, and *Mobile, etc., R. R. Co.* v. *Stroud*, 64 Miss., 784.

Argued orally by *J. McC. Martin, for appellant,* and by *Jas. C. Longstreet,* for appellee.

TRULY, J., delivered the opinion of the court.

None of the principles of law relied upon by appellant are applicable to the case made by this record. Conceding all for which he contends, a verdict in his favor could not rightfully be sustained.

The existence of a custom of certain trains to use the main line on all occasions, even if fully proven, would not excuse any one, whether trespasser, licensee, or employe, from the exercise of ordinary care and prudence on his part. See *Hackney* v. *Railroad* (Miss.) 33 So. Rep., 723; *Railroad* v. *Crockett*, 78 Miss., 412 (29 So. Rep., 162); *Railroad* v. *Arnola*, 78 Miss., 787 (29 So. Rep., 768; 84 Am. St. Rep., 645).

It cannot be said that appellant was injured by reason of any failure on the part of the master to provide a safe place for the performance of his duties, for the reason that appellant was not at the place where his duty called him. For his own convenience, and to save himself the trouble of a few more steps, he chose to walk upon the edge of the track, rather than in the place of safety provided by the company between the main line and the spur track, where, according to the evidence, there was ample room for him to stand in perfect safety while discharging his duties at the express car. One who, from motives of convenience and from personal choice, chooses the roadbed of a railroad to walk on, when not called there by any imperative duty, assumes all the risks which his own imprudence and lack of caution entail, and, if injured thereby, cannot recover. *Murdock* v. *Railroad*, 77 Miss., 487 (29 So. Rep., 25); *Railroad Co.* v. *Jones* (Miss.), 35 So. Rep., 193.

Under the facts of this case, the engineer was charged with no duty other than the exercise of ordinary care, even after he

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discovered appellant on the track. *Railroad* v. *Arnola, supra; Railroad* v. *Stroud,* 64 Miss., 784 (2 So. Rep., 171). The case of *Christian* v. *I. C. R. R.,* 71 Miss., 237 (15 So. Rep., 21), states the rule of the duty of the engineer discovering a person on the track clearly and fully. It was there held that if the engineer saw the person, and it was apparent, or ought to have been apparent, to the engineer that the position occupied by such person was one of peril, and one from which he could not by reasonable action extricate himself, or that the person was unaware of his position of peril, then it was the duty of the engineer to exercise reasonable care to prevent injury. The case at bar does not measure up to any of the requirements of the rule stated by that case. Appellant was not apparently in a place of peril. There was no *cul-de-sac.* He was walking on a level track, where a single step to either side would have removed him from all danger, as it did his brother, who was walking near him. The engineer had no reason to believe that he was in a place of danger. He had a right to assume that appellant was aware of the approach of the train, and was perfectly familiar with the surroundings; that the performance of his duty did not necessarily call him where he then was; and that he was on his way then to meet and transact business with the train when it should come to a stop. Under these circumstances, there was no duty incumbent upon the engineer which the record does not show he fully discharged. Appellant's sad case is but another of a long line where persons, growing careless through familiarity, cease to regard with proper care the imminent danger always attendant upon the use of the roadbed of a railroad as a thoroughfare, and neglect to make proper use of the physical faculties with which they are by nature endowed. *Affirmed.*

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Syllabus.

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YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY v. LILLY I. SCHRAAG.

1. RAILROADS. *Master and servant. Incompetent employes. Personal injuries. Common law liability. Ch.* 66, *Laws* 1898; *ch.* 87, *Laws* 1896.

The decision declaring ch. 66, Laws 1898, and ch. 87, Laws 1896, unconstitutional as class legislation, because the modification of the fellow-servant rule therein contained was applied to all corporations without reference to the use of dangerous agencies in their business, does not relieve a railroad company of its common law liability for injuries causing the death of an employe when such injuries resulted from its employment, without due care, of other servants who were incompetent. *Ballard* v. *Cotton Oil Co.*, 81 Miss., 507, explained.

2. SAME. *Pleading. Sufficiency.*

In an action for the death of an engineer, resulting from a collision with a switch engine, a declaration alleging that the switch engine was carelessly, recklessly, and negligently ordered out of the yards by the agent of the company, who was engaged in another department of labor and made to proceed on a track which curved sharply around a high embankment at the time when a passenger train proceeding in the opposite direction was entitled to the use of the same track; that the collision was directly due to the reckless ordering out of the engine; that it was impossible for deceased who was the engineer on the passenger train to check the same after he saw the track was obstructed by another engine, which obstruction was, through the order of the agent, negligently allowed by defendant to be made on the track, is sufficient to sustain a recovery on the ground of negligence of the defendant in failing to furnish competent employes, where such negligence was established as that of a yard-master whose authority to give the order characterized him as a superior agent of the company, and the declaration was not attacked on the trial, and defendant asserted deceased's contributory negligence was the only available defense.

3. SAME. *Sufficiency of declaration. Statute of jeofails. Code* 1892, § 746.

Under Code 1892, § 746, providing a judgment shall not be reversed after verdict for any mistake or misconception of the

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form of action, or for any other defect of form in the declaration, an objection to plaintiff's right to recover because of an insufficiently stated cause, and not her right to recover on a properly stated cause, is an objection to the form of pleading, which must be seasonably interposed in the trial court.

4. SAME. *Objection not made on trial.*

Where a defendant in an action for death resulting from a collision relied on the single ground of deceased's contributory negligence, it cannot, on appeal, assert the insufficiency of the declaration to state a cause of action for negligence in furnishing incompetent servants.

5. SAME. *Peremptory instruction. Objection to refusal. Generality.*

The request by a defendant for a peremptory instruction, in an action for death resulting from collision, is too general as an objection to the declaration as insufficient to state a cause of action for failure to furnish competent servants.

FROM the circuit court of Copiah county.

HON. ROBERT POWELL, Judge.

Mrs. Schraag, the appellee, was plaintiff, and the railroad company, appellant, defendant in the court below.

The death of Samuel Schraag, plaintiff's deceased husband, was caused by a collision on the 6th day of January, 1902, just below Vicksburg, on the Yazoo & Mississippi Valley Railroad, between the northbound passenger train, of which Schraag was engineer in charge, and a switch engine then engaged in switching a train of freight cars. The collision occurred about a mile and a half below the Vicksburg depot, but within the yard limits of the railroad company, and before the passenger train had reached the corporate limits of the city. At the time of the collision Schraag's engine was running northward, approaching the city, within the yard limits, at a rate of speed variously stated at from eighteen to twenty-five miles per hour. The freight train was going south, and was being pushed by an engine at the rate of about eight or ten miles per hour. The collision occurred at a curve at the apex of a pretty high hill. There was a straight line of road which

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ran from a tunnel about three-fourths of a mile below the place of the collision nearly up to that point, and there the road curved to the east around the apex of the hill, and then ran straight back to Vicksburg. The evidence showed that the passenger train came out of the tunnel running about twenty-five miles per hour; that the steam was cut off, and the train ran down a grade mainly by its own impetus. While this train was making this run from the tunnel to the place of the collision there was on the other arm of this curve, and below the apex of the hill which was in the bend of the curve, a switch engine, which was working in the yard. This engine was backing upgrade south, pushing a train of thirty-one cars. One witness testified that several parties, some representing the defendant and some the plaintiff, got together and took a couple of engines down to the scene, and located them, and backed them forward and back, and then an engine was located 628 feet below the place of the accident and one at the place of the accident, and that they were then visible to each other; that the engine which was at the point of the accident was then backed northward, and then it passed around the curve of the apex of the hill, and when it reached a point 215 feet north of the point of the accident it passed out of sight of the engine, which was 628 feet below the point; that at the rate of speed at which the two trains were running they would have covered the distance between the two points of observance where neither could be seen by the other in less time than thirty seconds. William Schmidt, a witness for plaintiff, testified: That he lived in Vicksburg, was a fireman by trade, and was working for the defendant railroad company. At the time of the accident he was firing switch engine No. 42, which collided with Schraag's engine. That "all I know is that I told the engineer that it was 6:33 when we coupled to the cars, and not to go out there, and the man following me cursed me and told me all I had to do was to fire the engine, and that was at the lower end of the yard. Mr. Earp, the yardmaster, gave us the signals to get out of the way as

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fast as we could. I was leaning out of the cab, and I saw No. 11 [Schraag's engine] coming out of the tunnel, and I hollered to the engineer, 'There she comes!' and he did not say anything, and I commenced getting down, and he blowed one short whistle not long before they hit. That Dart, the engineer on the switch engine, is what you call a 'green engine hand'; he had but a few nights' experience—about eight or ten nights." That there was no flag out to warn Schraag, and that, although he was looking for a collision and he saw Schraag's engine, he barely had time to jump, and save his life. That the yardmaster who ordered them out and everybody on his train were immediately discharged after the accident occurred. That, knowing that the switch engine was going out on the time of the incoming passenger train, he kept a constant lookout for that train, and knew his life was in peril, and so informed his superiors. That he had called the engineer's attention to the fact that they were on the time of the passenger train, and that he kept himself where he could see clearly and where he could jump. That there was no flagman protecting the train, and that it was the duty of the railroad company to protect such train by flags on their going out on another train's time, and also to protect the other trains. This witness' attention was called to rules 92, 99 and 99c, found in the book of rules of the railroad company, and was asked if any of these rules were observed to protect Schraag's engine. It was then admitted by counsel for defendant that these rules were not observed, and that defendant was negligent in not observing these rules. Mrs. Schraag, plaintiff, testified that her husband was forty-four years old at the time of his death, and was earning $150 per month. For the defendant, W. H. Rowell, the fireman on Schraag's engine, testified that they were running about on time on the morning that the accident occurred; that he was straightening his things around in the cab, and had gotten his broom to sweep the deck of the engine, and was at work at that up to two or three seconds before the accident hap-

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pened; Schraag put his emergency brake on, and the witness lit out of the gangway; that Schraag did not put on the brake until they were right on the switch engine; that it would take from 600 to 800 feet, with every condition favorable, to stop a train such as Schraag was pulling that morning, on the grade where this accident happened. On cross-examination this witness stated that Schraag blew his whistle just as he came out of the cut, as he always did, shut off the steam, just as usual, and applied the surface air as usual.

"*Q.* Will you just describe in your own language how this thing happened that morning—what you were doing, and what you saw there?

A. Everything that I saw to the time it all happened was the deck of this engine, until he put the air on the emergency. I kinder slightly looked up at him, and he seemed to be trying to put the reverse lever back, and I immediately went to the gangway, and the engine struck before I could get off.

Q. When you looked up, what did you see Mr. Schraag doing?

A. He was bending over in this position, and it seemed to me that he was trying to pull the lever back.

Q. Did he not have the lever?

A. I think he had hold of it. He was in a position to have hold of it."

Joe Lilly, a practical railroad engineer, testified, in reference to the rules under which the trains were operated on the Illinois Central Railroad, that a train of the kind Schraag was pulling could be stopped, under favorable conditions, between 800 and 1,000 feet. Holmes Rodgers, a railroad engineer, testified to practically the same thing. P. Ryan, a witness for the defendant, testified that he had been in the employ of the defendant company as a railroad engineer for some time; that a train like Schraag's, with all conditions favorable, might be stopped within 800 feet, but that it was very hard to tell just how far it would take to make an emergency stop; that it was com-

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paratively easy to tell the distance in which the regulation stops could be made, but very difficult to calculate with any degree of precision upon an emergency stop for a train like this; that it might require 1,200 or even 1,500 feet, to use the exact words of the witness, "I would hate to place my calculation on anything on an emergency stop."

"*Q.* You would not undertake to say, in an emergency stop, that you could stop in any given number of feet?

A. No, sir."

Tom Crammer, a witness for defendant, testified that he was the conductor of the train which was being pulled by Schraag at the time of his death; that Schraag was just a few minutes behind time at the time of the accident, but that was no unusual condition; that Schraag had the right over all trains; that he was a competent and careful engineer, and was making no effort to make up the few minutes which he was behind, and doing nothing out of the usual routine at the time of the accident. There was verdict and judgment for plaintiff for $15,000.

Mayes & Longstreet, and *J. M. Dickinson,* for appellant.

This suit was brought by the widow. It was based on the constitutional rule in regard to injuries caused by the negligence of co-employes who are engaged in a different department of labor or in a different work, or on a different train. Such a suit cannot be maintained by the widow, even although the company might be liable.

The court will note that this is not a case like the Woolley case, where the injury was charged to have originated by an improperly constructed or otherwise defective track; but, as the declaration expressly avers, the negligence charged is the negligence of the employes of the company in charge of the yard and the switch engine in ordering and permitting such switch train out upon the main line at the time when the northbound

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passenger train was about due, and thereby producing the collision.

It is clearly such a case as prior to the enactment of the new rule by the constitution could not have been maintained at all; this fact is plainly recognized by the care with which the pleader in drafting his declaration invokes the constitutional language, even putting it in quotation marks.

In this state of the case the law is well settled, and the two controlling decisions are *Bussey* v. *Railroad Co.*, 79 Miss., 597; *Ballard* v. *Miss. Cotton Oil Co.*, 81 Miss., 507.

We have said that this case was brought under the constitutional rule; to speak more precisely, it was clearly brought under chapter 66 of the laws of 1898, which this court declared to be unconstitutional and void in toto in the Ballard case, *supra*.

The action not being maintainable under chapter 66 of the acts of 1898 because that chapter is absolutely void, the question arises whether it is maintainable under any other statute or constitutional provision of this state.

It is certainly not maintainable under chapter 87 of the acts of 1896, for the reason that the decision in the Ballard case effectually disposes of that chapter also. It is liable to precisely the same constitutional objection. We hardly think it probable that the appellee will invoke this chapter in support of her recovery.

The action cannot be maintained under sec. 663 of the code, which is Lord Campbell's act, and this is settled so thoroughly as not to need argument. *Railroad Co.* v. *Hunter*, 70 Miss., 471; *White* v. *Ry. Co.*, 72 Miss., 12; *Woolley* v. *Railroad Co.*, 77 Miss., 927; *Bussey* v. *Railroad Co.*, 79 Miss., 597.

It, therefore, is settled law in this state that in order that the common law liability shall apply, there must be a defect in the track itself for which the company, in its corporate capacity, is directly liable as in other cases of defective appliances; but where the track is otherwise in good condition, and it is dangerous only because obstructed by the presence on it at an im-

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proper time of rolling stock of the railroad company, placed there or allowed to get there, by the intervening negligence of employes, the common law liability does not exist, and the only liability is that of the constitution and the resulting statutes subsequently enacted.

The widow, therefore, having no right to sue in such case under section 193 of the constitution, nor yet under section 3569 of the code, the only question remaining is whether she is enabled to sue by section 2 of chapter 65 of the laws of 1898. That section provides that this act (that is, chapter 65), "shall apply to all personal injuries of servants or employes received in the service or business of the master or employer, where such injuries result in death."

Now, in the Bussey case, *supra,* this court expressly held that chapter 65 is nothing but an amplification of Lord Campbell's act, and has no relation whatever to any case of liability arising under the constitution. It held that the two chapters, 65 and 66, related to entirely different subjects matter; that there was no confusion of boundaries between them. It held that chapter 65 related only to common law liabilities, while chapter 66 related exclusively to those liabilities which were originated by the constitution and as conferred by it. The liability alleged in the case at bar indisputably falls in the latter class; and, therefore, unless this court is prepared to overrule the Bussey case, it is beyond question that chapter 65, neither section 1 nor section 2, has any relation to the case at bar. In that decision, this court is careful to explain the applicability and scope of this very section 2. It was there urged upon the court that the view taken by his honor in the trial court in the original decision of the Bussey case was correct, because this very section 2 showed in express terms that the remedies therein provided were to be applied in the case of all injuries to servants or employes, even where such injuries should result in death. But this court said "no," that that statute only applied, and was by the legislature only intended to apply, to that class of cases where the

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death of the employe was caused by the negligent act of the company itself, and it did not apply in any case where the negligence was not of that character attributable by the common law to the corporation, but was the intervening negligence of a fellow-servant—the fellow-servant being the common law fellow-servant.

It follows, therefore, as a necessary result that even if the company in this case was liable for the death of Mr. Schraag, the liability is not to the widow, and this judgment must be reversed for that reason.

In addition to what has been said above, it is extremely questionable whether the legislature, in view of the declaration of section 193 of the constitution that "Where death ensues from any injury to employes, the legal or personal representatives of the person injured shall have the same rights and remedies," etc.—could by statute extend the right to recover in such case to any person other than an executor or administrator, or, to put it more narrowly, whether it could extend the right of recovery to the widow.

Judge Calhoon, in his dissenting opinion in the Bussey case, expressly declared that such legislation would, in his judgment, be unconstitutional. And the recent decision of this court in the case of *Allen* v. *Alliance Trust Co.*, goes to support the authority of that dissent.

It may be argued with great force that inasmuch as the right to recover did not exist at all until the constitution gave it, then when the constitution in giving it declared who should recover, that was tantamount to a constitutional declaration that none other might recover.

It is, however, not necessary to run out this contention, for the reason that, as we have shown above, the legislature has not yet undertaken in this class of cases to confer the right of action upon the widow in any statute except in chapters 87 of the laws of 1896 and 66 of the laws of 1898, both of which are unconstitutional and void in toto.

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Effort is made to avoid this point and to excuse Mr. Schraag's disregard of the rule, by showing that he was running at the customary rate of speed at that place, and doing what had been frequently done by him before, and what was done commonly. But this is no answer. 3 Elliott on Railroads, sec. 1282; *Railroad Co.*, v. *Rush*, 71 Miss., 987; *Martin* v. *Railroad Co.*, 77 Miss., 720; *Railroad Co.* v. *Myers*, 19 Am. & Eng. Railroad Cases (N. S.), 776; *Railroad Co.* v. *Wallace*, 76 Tex., 636; *Green* v. *Brainerd*, 27 Am. & Eng. Railroad Cases (N. S.), 87.

The court below erred in refusing the second and third instructions asked by the defendant.

These instructions were based on the idea that if Schraag instead of keeping a lookout for himself after coming out of the tunnel, entrusted it to his fireman to keep a lookout and the fireman failed to do so, and if by keeping such lookout the fireman could have seen the switch engine in time to have avoided such collision, the jury should find for the defendant.

These instructions should have been given. The uncontradicted proof in the record was that the fireman was under Schraag's control.

These instructions, therefore, were intended to present, and did present, the case of what is left of the fellow-servant doctrine after the modification of it by our constitution and statutes.

The constitutional rule has no operation here, for the reason that it is not applicable to the particular instance. This engineer and fireman were running the same train, on the same engine. They were not running different trains; they were not engaged in different departments of labor.

The proposition sought to be submitted to the jury was that if Schraag relied upon the fireman to keep a watchout and the fireman failed to do so, the defendant won out under the old common law fellow-servant doctrine, and it was a correct exposition of the law.

It is an admitted fact that the fireman did not keep a lookout. He himself admits it. He says that he was engaged in sweeping

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off the deck of the cab. The fact is, he was running into Vicksburg within a mile and a half of his stopping place. Sweeping out his cab was a thing in no wise connected with the running of his train. It was a simple process of cleaning up, which could just as well have been done after the arrival of the train at Vicksburg, and which should have been so done.

It is perfectly manifest that there was no necessity for that diversion of the fireman's attention, and it is not in this case pretended that there was any necessity for it.

So, even if the plaintiff does not lose because of the manifest contributory negligence on the part of Schraag, this case ought to be reversed because there should have been submitted to the jury the question whether the omission of the fireman to attend to his duty and keep a lookout did not cause the collision.

The second instruction given in behalf of the plaintiff is as follows:

"The court further instructs the jury for the plaintiff that Schraag had a right to rely upon the rules of the company being enforced; and this fact, in connection with all the other evidence in the case, should be considered in determining whether or not he was guilty of contributory negligence.

The manifest purpose and the only object which could be accomplished by this instruction was to convey to the minds of the jury the idea that because there were certain rules of the company which required the track to be kept clear ten minutes before the incoming of the passenger train, so as to give the passenger train the right of way; that Schraag, the engineer, in running into the yards had a right to rely upon the observance of that rule by the yardmaster, and had a right because of such reliance to relax the vigilance imposed upon him, both by the law and by the rules of the company. Such was the manifest object of the instruction, and such must have been its necessary operation.

The fourth instruction is also vicious. It runs as follows:

"In the event the jury shall find for plaintiff, it is their duty

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to find a verdict for such sum as will be fair and just to her for the injury resulting from the death of her husband, not to exceed the sum sued for in this case."

Within the $25,000 limit indicated by the final clause, this instruction turned the jury loose, to do what? They were required as "their duty" to assess a sum which should be "fair and just to her," and eliminated from the instructions all restriction to the assessment of those damages which were compensatory only. There is absolutely no reference to the evidence in any shape.

Mr. Schraag was killed instantaneously; there was no element of suffering to him, either of body or mind. The widow is entitled to recover purely compensatory damages, not including mental suffering, loss of society, etc.

The jury are not required by that instruction to take into consideration any element of fairness or justice to the defendant. In effect they are turned loose, to be controlled only by their sympathetic feelings for the widow. It is within the principle of the case of *Yazoo, etc., Railroad Co.* v. *Smith,* decided by the court at the present term, where a judgment was reversed because the jury were instructed that they might find such damages as they should see fit.

Where the plaintiff undertakes to have the jury instructed as to the basis of recovery, the instruction should be more definite than the one here given; and the jury should not be turned loose with what is, in effect, *carte blanche,* the only restriction being their own conception of what is fair and just to the plaintiff, without any limitations as to the standard by which fairness and justice are to be measured, except sympathy. *Quincy Co.* v. *Schulte,* 71 Fed. Rep., 487; *Martin* v. *Johnson,* 89 Ill., 537; *Railway Co.* v. *Chisholm,* 79 Ill., 584; *Railway Co.* v. *Fravier,* 19 Ill., App., 92; *Haskett* v. *Small,* 16 Ind., 81; *Railway Co.* v. *Shook,* 3 Kan. App., 710; *Griffith* v. *Depew,* 3 A. K. March (Ky.), 177; *Varillat* v. *Railroad Co.,* 10 La. Ann., 88; *Daily Post Co.* v. *McArthur,* 16 Mich., 447; *Morrison* v.

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Yancey, 23 Mo. App., 670; *Iron Works* v. *Barber*, 102 Pa. St., 156; *Sanderson* v. *Coal Co.*, 102 Pa. St., 370; *Girdner* v. *Taylor*, 6 Heisk. (Tenn.), 244.

This instruction is not cured by the sixth for defendant. Even this sixth instruction does not restrict the jury to the ascertainment of an amount from the evidence. Moreover, so far as it goes, the two are in conflict.

J. S. Sexton, and *Johnston Armstrong*, for appellee.

The declaration alleges that the injury resulted from the reckless ordering out of the switch engine by defendant's servant at a time when the incoming passenger train might at any moment collide with it, the track, besides being the same on which the passenger train would come in, making a sharp curve around a high embankment in such manner as to cut off the view along the track from both directions.

The declaration does not employ the word "fellow-servant" from beginning to end, nor will that word be found in any instruction asked by the plaintiff in the court below, and both the declaration and the evidence in the case fix the responsibility in this case where it belongs, and that is upon the defendant company.

It is true that the declaration refers to the agent and servant of the defendant company by whom engine No. 42 and the train of cars was ordered out, as "engaged in another department of labor," and "about a different piece of work," and it may be claimed that these terms are some of the terms used by the constitution as descriptive of that class of fellow-servants whose negligence, resulting in injury, will furnish a cause of action to an injured fellow-servant, and this is true, but the terms are equally applicable to "a superior agent or officer" (the yardmaster, for instance), who is "engaged in another department of labor" or "about a different piece of work." And if plaintiff, by her declaration, had been seeking to recover on account of the negligence of Schraag's fellow-servants, and

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to have limited her declaration to that, she would doubtless have referred to the negligence of his fellow-servants "on another train of cars" (meaning the switch engine crew), and no such terms or reference can be found in the declaration.

In this connection we call the court's attention to the fact that there is no demurrer to the declaration found in the record, and if it be granted, as it is not, that the declaration omitted "the averment of any matter without proving which the jury ought not to have given such verdict, or for setting forth by way of recital any matter which ought to have been set forth by averment," such omission, as well as "any other defect of form in the declaration," was cured by the verdict in the case under § 746 of the annotated code of Mississippi, known as the "Statutes of Jeofails." See, also, Code 1892, § 718; *Holmes* v. *Preston,* 70 Miss., 152.

Again referring to the declaration, it will be seen that the plaintiff does not claim damages by reason of the fact that John Dart, the engineer on engine No. 42, "carelessly, recklessly and negligently" pulled out said engine of his own motion and caused the collision, but the complaint is that said engine and the train attached thereto "had been carelessly, recklessly and negligently ordered out of the yards of said company by the agent and servants of said defendant company." The word "agent" is not prefaced by the word "superior," but the fact that the agent, whose conduct is complained of, "ordered" the engine and cars which collided with Schraag's engine "out of the yards of said company" and that his orders were obeyed, carries with it the necessary implication that he was such "a superior agent or officer" of the defendant corporation as is referred to in sec. 193 of the constitution, whose negligence, resulting in injury, would furnish a cause of action to an employe of said corporation under said section of the constitution, or without reference to the same, because, as we understand the law, the negligence of an agent of a corporation, exercising such powers as are given to the yardmaster of the defendant

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corporation by its rules, which were offered in evidence in this case, in sending out a green engineer, such as Dart was shown to be, on an engine overloaded with a heavy train of cars on an up-grade, in being without a watch on such a vital occasion as this, in sending out an engine without a headlight in proper condition, and in giving the high ball signal to go in the direction of an approaching train around a curve as rapidly as possible, would render such corporation liable under the well-established doctrine that a master must furnish competent employes, as well as proper appliances, and take proper precautions to prevent injury to his servant, without refernce to the constitutional provisions announced in said section 193.

In the case of *White* v. *Railway Co.*, 72 Miss., 12, which was an action brought by a mother for the death of a son, Whitfield, justice, delivering the opinion of the court, used the following language: "The ground of liability is the common law duty of appellee to provide safe machinery and appliances for its employes. The remedy to enforce this liability in favor of appellant in the case made in this record is based properly on Code 1892, § 663. The negligence alleged is not the negligence of a co-employe, but the negligence of the company itself. *Railroad Co.* v. *Hunter,* 70 Miss., 471, therefore, does not apply. The ground of liability on which this case is rested existed before the constitution of 1890 and is wholly independent of it. That instrument did not take away any existing ground of liability; it added new ones theretofore denied by our laws."

In that case, the negligence complained of consisted in defective appliances (the miller draw-head). There was the usual dispute as to whether the appliance was a safe one, in reference to which the court used the following language: "Ought not the question of fact as to the sufficiency and safety of these appliances to have been submitted to the jury? The law is imperative in demanding that railroad companies shall furnish its employes engaged in the hazardous work of coupling

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cars safe and sufficient appliances." 2 Thompson on Negligence, 989.

In the case of *Railroad Co.* v. *Woolley,* reported in 77 Miss., 941, this court followed the decision above referred to, and in this case the widow instituted suit for the death of her husband, just as we have done in the instant case. Calhoon, justice, delivering the opinion of the court, said: "The death of plaintiff's husband, having occurred . . . before the Act of 1896, and he being an employe of the company, his widow could not sue basing her action on sec. 193 of the constitution as to fellow-servants, as was held in *Illinois, etc., R. R. Co.* v. *Hunter*, 70 Miss., 471. This she concedes, and therefore she places her right to sue on the case of *White* v. *Louisville, etc., R. R. Co.,* 72 Miss., 12, which holds that she may sue where her claim is not on the ground that the death was caused by the negligence of a fellow-servant, but because of the negligence of the company in not providing a safe railway. Such right to sue for the company's negligence that case holds to exist independently of the constitutional provision. It follows that if the negligence of the company showed a want of ordinary care and was the proximate cause of the death in this case, Mrs. Woolley had a right of action, otherwise not."

From the cases just cited, it is manifest that "if the negligence of the company showed a want of ordinary care, and was the proximate cause of the death in this case," Mrs. Schraag had the right to recover independent of the constitutional provision contained in sec. 193 of the constitution, and it is equally manifest that she has the right to recover under said constitutional provision, as developed by the acts of 1898, ch. 65, sec. 2, which provides: "This act shall apply to all personal injuries of servants or employes received in the service or business of the master or employer where such injuries result in death."

Referring to this section of the act of 1898, Whitfield, C. J., delivering the opinion of this court in the case of *Bussey* v.

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Railroad Co., 79 Miss., 606, used the following language: "This section . . . . expressly applies the principle of Lord Campbell's act—recovery for injuries resulting in death—to all employes, when the injuries were due to the negligence of the master. It was part of a statutory scheme that had never assumed to deal with injuries caused by the negligence of fellow-servants in any way whatever and it was not dealing with them. . . . The purpose of the legislature was plain. It was to observe the mandate of this most wholesome provision of the constitution, and so make effective the remedies for the new rights by it created, and also to broaden and develop the remedies for the rights provided for by Code 1871, § 676, and of the Revised Code 1880, § 1510—the initial form in which the code of 1857 and that statute left them—to the present completeness furnished by Laws 1898, ch. 65." Railroads are required to exercise prudence and judgment in the selection of their employes on the same principle which required them to provide safe machinery and appliances, and the failure to do so would render them liable for injuries resulting from negligence in this respect.

It seems from this record that Schraag had to run the whole gamut of negligence, indifference, incompetence and recklessness. Not only was the road over which he was called to run improperly constructed, and not only did he have to take the risk incident to the employment of a green engineer, but that engineer was subjected to the foolhardy directions of a yardmaster who must have been either drunk or insane, because it is impossible upon any other theory to believe the undisputed evidence found in this record and to believe that a sane and sober man, occupying Earp's position as yardmaster, would have been found without a watch, and would have sent out a green engineer in charge of an exceedingly heavy train of cars on a heavy up-grade on a high ball signal in the face of the warning given by the fireman, Schmidt, who pulled out his watch and warned the engineer "not to go out there." *Railroad*

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Brief for appellee.

Co. v. *Patton,* 31 Miss., 156; *Railroad Co.* v. *Allbritton,* 38 Miss., 242; *Railroad Co.* v. *Field,* 46 Miss., 573; *Hicks* v. *Railroad Co.,* 41 S. C. Rep., 753; 3 Woods Railway Law, sec. 389; *Railroad Co.* v. *Hughes,* 49 Miss., 287; *Morbey* v. *Railroad Co.,* 89 N. W. Rep., 105.

It will be seen that the defendant by one instruction invited a verdict, if the jury believed that Schraag "was killed in part by the negligence of the switch engine crew;" and by another, it invited a verdict if the jury believed from the evidence that "Schraag was killed by the negligence of the yardmaster or those managing the switch engine or by the negligence of both combined," provided only that Schraag himself was free from having contributed to his own destruction.

Not only did defendant invite a verdict under the conditions above stated, but it absolutely admitted the negligence both of the yardmaster and the switch engine crew.

The rules of the Y. & M. V. R. R. Company were offered in evidence and admitted to be the "book of rules in use by the defendant company." Counsel for plaintiff called the witness', Schmidt's, attention to a number of these rules to identify the same, and asked him whether or not they were observed that morning to protect Schraag's engine. Whereupon the witness answered in the negative, and counsel for defendant admitted that they were not, and also admitted that they (defendant's servants) were guilty of negligence.

By reference to the previous testimony of this witness it will be seen that he was examined at length both as to the negligence of the switch engine crew and the negligence of the yardmaster, and it was so perfectly palpable that all hands were negligent in every respect, that in order to get rid of any further investigation along this line, counsel for defendant admitted that "they (meaning both the yardmaster and switch engine crew) were guilty of negligence," but if the word "they" in this admission could be limited to the switch engine crew and not embrace the yardmaster, as it cannot, still by the 9th instruction

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asked by the defendant, the negligence of the switch engine crew alone, thus admitted, would render the defendant liable, provided Schraag was not guilty of negligence contributing to his death.

It is elementary learning that a party cannot occupy inconsistent positions in the trial of a cause in court, and if there is anything settled in the state of Mississippi, it is that the defendant cannot complain of a verdict which responds to an instruction asked by it in the court below.

In the case of *L. & L. & G. I. Co.* v. *Vann Os & Shuster,* 63 Miss., 440, Cooper, C. J., delivering the opinion of the court, used the following language: "The second instruction given for the plaintiffs, and the second for the defendant, announced practically the same rule for the guidance of the jury in determining what quantity of evidence was required by law to warrant it in finding a verdict for the defendant upon the ground that the plaintiffs had set fire to the store and burned their own goods. If the rule was erroneous it was invoked as well by defendant as the plaintiffs, and the defendant cannot assign it for error."

This case was followed by the case of *Wilson* v. *Zook,* 69 Miss., 694, where the following quotation from the syllabus correctly announces the rule: "One cannot assign for error the action of the trial court in giving an instruction for the opposite side, when he asked and obtained, as announcing in the law of the case, an instruction to the same effect."

The same rule is announced in the case of *Clisby* v. *Railroad,* 78 Miss., 937: "An appellant cannot complain of error in an instruction given at his instance, nor of a conflict in instructions produced by an erroneous one so given; nor of an instruction more favorable to him than the law warranted."

In the above case the court also adds: "It has been held that an appellant cannot complain of an erroneous instruction asked by him. *Insurance Co.* v. *Von Os,* 63 Miss., 431; *Wilson* v. *Zook,* 69 Miss., 694 (2 Thompson on Trials, p. 1750); *Flower*

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Opinion of the court.

v. *Helm,* 29 Mo., 324; *Carroll* v. *People,* 136 Ill., 456; *Williams* v. *Southern Pacific Railroad Co.,* 110 Cal., 457; *Reordon* v. *Missouri Pacific Railroad Co.,* 114 Mo., 384; *Lobdell* v. *Hall,* 3 Nev., 515."

The jury have passed upon the question of contributory negligence and their finding is fully justified by the facts.

Argued orally by *Edward Mayes,* for appellant, and by *Johnston Armstrong,* and *James S. Sexton,* for appellee.

WHITFIELD, C. J., delivered the opinion of the court.

We think the question of contributory negligence in this case was properly left to the jury, and has by the jury been properly settled. The evidence shows a case remarkable for the extent and variety of negligence on the part of the defendant railroad company. We have given the entire record the most careful consideration, and, unless the case is one in which no recovery at all is warranted under any declaration possible to be framed, this judgment must be affirmed. Perhaps the most earnest insistence of learned counsel for appellant at this bar is upon grounds not presented at all in the court below.

We may clear the way to decision by saying at once that, in so far as the declaration in this case seeks to recover under chapter 66, p. 84, of the laws of 1898, or chapter 87, p. 97, of the acts of 1896, it is not maintainable, because those acts have been declared unconstitutional in *Ballard* v. *Miss. Cotton Oil Co.,* 81 Miss., 507 (34 So Rep., 533; 62 L. R. A., 407). Counsel for the plaintiff below insists that he has a right of recovery on common-law grounds because of a defective track, the argument being that the obstruction of the track constituted a defective track within the meaning of the rule of law upon that subject, and it is stated in aid of this view that while this track, with its peculiar construction—around a sharp curve and a high hill— might have been a safe track when Vicksburg was a small place, it cannot be held to be so now, in view of the vast advance

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in the facilities for transportation, and in view of the many tracks made necessary by the growth of the city. This contention, on the evidence in this case, is manifestly untenable. It is perfectly plain that the injury here was not due to any defect in the track itself, constituting it, within the law on that subject, an unsafe roadway; but to the grossly negligent occupation of the track (safe enough in itself) by this switch engine crew on the time of the passenger train.

It is next insisted by counsel for appellee that plaintiff is entitled to recover under either of two grounds: First, on the ground that the injury was directly due to the negligence of the yardmaster, a superior agent of the defendant corporation, under section 193 of the constitution; and, second, that said negligence of said superior agent or officer, and of the engineer Dart, furnishes a cause of action to the deceased employe, without reference to section 193 of the constitution, on the common-law ground that this yardmaster and engineer were manifestly incompetent employes, and not selected with due care; and that the negligence of the said yardmaster exercising the powers he exercised, under the rules of the corporation in evidence in this case, in sending out a green engineer, such as Dart was plainly shown to be, and an engine overloaded with a heavy train of cars, thirty-one in number, on a steep up-grade, and in being without a watch upon such a vital occasion as this, in sending out a switch engine without a proper headlight, and giving "the high ball signal" to the switch engineer to go, in the direction of a very rapidly approaching train, around a curve, as rapidly as possible, at a time when the passenger train was practically due, indubitably stamped him, the said yardmaster, as being an incompetent and unfit employe to be intrusted with such powers, and fixed upon the corporation itself inescapable negligence in intrusting such an employe with so important a post. And it is said that this last cause of action is properly brought by the widow on the common-law doctrine as to the right, and under section 2, ch. 65, p. 83, Acts 1898, as to the remedy, as held in

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Opinion of the court.

White v. *R. R. Co.*, 72 Miss., 12 (16 So. Rep., 248); *R. R. Co.* v. *Woolley*, 77 Miss., 941 (28 So. Rep., 26), and *Bussey* v. *R. R. Co.*, 79 Miss., 597 (31 So. Rep., 212).

We will deal with this second cause of action based on the common-law principle first; and, as to this, learned counsel for appellant conceded the soundness of the general principle contended for by appllee; that is to say, that such cause of action is maintainable by the widow under said section 2 of chapter 65, p. 83, of the acts of 1898. But they say that the declaration here does not state this cause of action at all, but is based entirely on "the intervening negligence of fellow-servants." We think learned counsel for appellant mistake the scope of the declaration and the effect of the testimony in this case. We are clearly of the opinion that the testimony in this cause makes out a clear liability on the part of the defendant company on the common-law ground just stated. The cause of action on this ground is abundantly made out by the testimony. In all the extreme applications of the fellow-servant doctrine in this state in past adjudications, one thing was yet always consistently adhered to, to wit, that the failure to select and furnish fit and competent employes was the failure of the master himself to discharge a personal duty which he owed his employes, and which he could not delegate to another; and, of course, was such negligence of the master himself as entitled the injured party to recover therefor. This negligence is established in this case beyond controversy. The only defense, therefore, that the appellant can interpose along this line is not that the cause is not proven, but that the declaration did not specifically count on this ground; in other words, we must deal with a thoroughly established cause of liability on this ground on the proof, and then determine whether this objection on the ground of improper pleading can be made in this court for the first time.

We here set out the material parts of the declaration in its first and second counts, which are as follows:

"For that whereas heretofore, to wit, on the 6th day of

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Opinion of the court.

January, 1902, the said defendant, the Yazoo & Mississippi Valley Railroad Company, was in charge of and operating a railroad extending through the state of Mississippi, which passed and now passes through the counties of Copiah and Warren, and other counties in said state, and in the operation of said railroad the said defendant, at the time aforesaid, had in use, and running thereon locomotives and cars, propelled by steam, and the plaintiff's husband, Samuel Schraag, was a locomotive engineer in charge of the northbound passenger train known as No. 26, which was due in Vicksburg at 6:45 A. M., and was due at the freight yard of said defendant company in the city of Vicksburg at 6:40 A. M. The said defendant also had, in use and operation, in the city of Vicksburg, in said county of Warren, at that time, a freightyard, in which yard the defendant company was in the habit of making up trains of cars to be sent out in its service, and doing such other things as were convenient and necessary to the operation of its business. On said 6th day of January, 1902, the said Samuel Schraag, deceased, was in charge of the engine hauling said train No. 26 belonging to the defendant corporation, and under the directions of said defendant company was hauling said train with a load of passengers thereon to said city of Vicksburg in Warren county, Miss., and he was entitled, under the rules of said company, to a clear and unobstructed track throughout said county of Warren to his destination at said city of Vicksburg, and while so engaged, and exercising due care for his own safety and that of his crew and passengers, his engine going north collided, in said county of Warren, in the state of Mississippi, with engine No. 42, and a train of over thirty freight cars in charge of one John Dart, engineer, which said engines and cars belonged to and were being operated by the agents and servants of the defendant company at the time, and which had been carelessly, recklessly, and negligently ordered out of the yards of said company, in said county of Warren, by the agents and servants of said defendant company who were engaged in 'an-

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other department of labor,' and 'about a different piece of work,' and which were going south on the track of the defendant company, on a curve of the defendant's track, at a great rate of speed, at the time when the said train, No. 26, in charge of said Samuel Schraag, was entitled to the right of way and a clear track, and the said Samuel Schraag was so bruised, mangled, torn, and scalded by such collision, occasioned as aforesaid, that he died within a few minutes thereafter from the effects thereof, after suffering the most excruciating agony.

"Plaintiff further avers that said collision occurred at a point where the track of the defendant company runs close to the edge of an embankment from sixteen to twenty feet high, and said Schraag, by most heroic efforts, managed to get his train in check, and to hold the same on the track, and thus save the lives of his passengers and the property of the defendant company then in his charge, though it was impossible for him to do this and save his own life after he first saw that the track to which he was entitled was obstructed by another engine and train of cars so negligently allowed by the defendant company to occupy said track at the time he was entitled to the same free from all obstructions."

It is true that the declaration in the first count does not use the words "superior agent," but it expressly says, which said engine "had been carelessly, recklessly, and negligently ordered out of the yards" by the agents and servants of said defendant company who were engaged in "another department of labor." The declaration expressly recites that Schraag's train was due at the yards at 6:40 A. M.; that the defendant had a freight yard, "in which yard the defendant company was in the habit of making up trains of cars to be sent out in its service, and doing such other things as were convenient and necessary to the operation of its business;" and it further expressly avers that the switch engine No. 42, with a train of thirty freight cars, was so ordered out by the agent aforesaid, and the collision is directly charged to be due to this reckless ordering out of this

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engine on the track by the company's negligence. We do not think it at all a strained construction that the declaration does charge, in effect, that this ordering out was by a "superior agent," having the right to so order, and ordered out, too, in the very time when the passenger train was entitled to a clear track, and ordered out, furthermore, on a track which curved very sharply around a very high embankment; and it will be specially noted that the declaration, in the second count, expressly avers that it was impossible for Schraag to get his train in check after he first saw that the track, to which he was entitled, was obstructed by another engine and train of cars, and that such obstruction was, through the order of the superior agent, negligently allowed by the defendant company to be made on said track at the time when he was entitled to the same free from obstructions. Here, indeed, is a direct charge that the collision was due to the negligence of the defendant company, and not to the negligence of any fellow-servant. It is true, it is a very general charge that it makes; that it does not, in so many words, say that the specific negligence of the company consisted in furnishing incompetent employes; but the case falls, in this regard, precisely within that of *Railroad Co.* v. *Price,* 72 Miss., 869 (18 So. Rep., 415). It must be remembered that no demurrer was interposed to this declaration, and that no objection was made on the score of insufficient pleading in any way, and that no objection was made to the introduction of testimony that makes out the cause on this common-law ground, at any time during the trial, on the ground of variance. Had any objection been made, at one time or another, it would have been immediately remedied by a proper amendment. In the Price case a recovery was insisted upon because the railroad company had failed "to instruct its inexperienced switchman as to how a particular coupling should be made."

The declaration in the case did not specify this as the ground of recovery. There, just as here, no objection was taken to the declaration on this ground in the court below,

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nor was there any objection on the ground of variance between the declaration and the proof; and yet the case pivoted precisely and exactly upon this proposition: that the plaintiff was entitled to recover solely, if at all, on the ground that the defendant company had so failed "to instruct its inexperienced switchman how to make this coupling." When the case got to this court for the first time, that objection was pressed, and we met it through Woods, J., as follows: "Just here, however, the appellant contends that the failure of the railroad to instruct its inexperienced switchman as to how this particular coupling should be made cannot be considered by us, because that was not the ground of complaint made by the declaration, and is not the negligence charged. The declaration was defective in not distinctly averring the inexperience and ignorance of appellee, and the failure of appellant to instruct or warn him; but it did aver, in general terms, injury because of appellant's negligence in furnishing dangerous cars or appliances. The appellant pleaded the contributory negligence of appellee, and he replied, denying the plea. On trial, anticipating appellant's evidence that he had placed his arm between the bumpers, where inevitably it would be crushed when the cars came together in making up the train, the appellee offered evidence to show, in avoidance of the effect of this anticipated evidence, that he was inexperienced and ignorant of the proper method of making the coupling that day required of him, and that he was not warned of the extrahazardous nature of the service required by his superiors, nor instructed at all how to make the coupling. The railroad did not object to the introduction of this testimony, but joined issue with its adversary, electing to take the chances of a favorable verdict on the whole case as presented, including this evidence of which it now complains. The averments of the declaration did not show one cause of action, and the complained-of evidence supports another and different cause of action. The appellant did not then so think. It did not object to this evidence as incompetent, and, if it had, the court would

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have permitted the appellee instantly to amend his defective pleading. Section 718, Code 1892, declares that 'a variance between the allegation in a pleading and the proof shall not be deemed material, unless it shall actually mislead the adverse party, to his prejudice, in maintaining his action or defense upon the merits; and where it shall not be shown to the satisfaction of the court that the party has been so misled, an immediate amendment of the pleadings may be made without costs, and without delaying the cause. If the party have been so actually misled, an amendment may be allowed on such terms as shall be just.' Among many other provisions of our statute of joefails (sec. 746, *Id.*), it is declared that a judgment shall not be reversed, after verdict, 'for omitting the averment of any matter without proving which the jury ought not to have given such verdict.' In considering this statute it was said in *Holmes* v. *Preston,* 70 Miss., 152 (12 So. Rep., 202): 'If a defectively stated case is well proved, the verdict cures the defect of the pleading, and so, after verdict, nothing to the contrary appearing in the record, it would be presumed that a case was proved entitling the successful plaintiff to the verdict secured,' etc. See the same case, 71 Miss., 541 (14 So. Rep., 455)."

That case covers this precisely. This declaration cannot, under any reasonable construction, be said to show one cause of action, and the evidence to support another and different cause of action. The declaration does, though defectively, state as one of the grounds of recovery the negligence of the defendant company itself; nay, more, it specified that that negligence consisted in ordering out this switch engine recklessly, carelessly, and negligently, on the track, at the time when the passenger train was due. This ordering out was made by the superior agent—some one having the right to order—and this agent was manifestly incompetent. It is too late now to object, on the single ground to which appellant must be confined, that, as a matter of pleading, the declaration did not at all state this ground of action; too late for two reasons: First, because we

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think it does state such general negligence quite as sufficiently as it was stated in the Price case; second, because this is not a case, as insisted by learned counsel for appellant, in which the appellee has no cause of action, however she might frame her declaration. Counsel for appellant attempts to meet the Price case, *supra,* by citing the cases of *Burke* v. *Shaw*, 59 Miss., 443 (42 Am. Rep., 370); *Vaughn* v. *Hudson,* 59 Miss., 421; *Gabbert* v. *Wallace,* 66 Miss., 618 (5 So. Rep., 394); *Cole* v. *Coon,* 70 Miss., 634 (12 So. Rep., 849). Counsel correctly cited these cases as holding that, where a question goes to the very foundation of plaintiff's right of action, it may be raised in this court for the first time. That doctrine is perfectly sound, but that is not the case here. This is not a case where Mrs. Schraag has no right of action at all; it is a case where the testimony shows that she is clearly entitled to recover on the ground indicated. Counsel's objection, in short, "has this extent—no more:" that she is simply not entitled to recover under this declaration; and, that being the extent of his objection, he was bound under sections 718, 746, of the code of 1892, to interpose it seasonably in the court below, because it is at last nothing but an objection to the form of pleading; objection, emphatically, not to the plaintiff's right to recover upon a properly stated cause, but objection solely to her right to recover because of an insufficiently stated cause. *Burke* v. *Shaw* was a case in which the court held that the plaintiff had no right to recover in any form of action, because the ashes were neither the property of the foundry nor on its ground. *Vaughn* v. *Hudson* was a case in which the court below had ordered a sum of money —which should have been paid in part to the widow, Frances— to be paid wholly to the five children of herself and her deceased husband. This court simply said that the widow was entitled to her one-sixth part, and that in no possible view could the decree taking that from her be approved. *Gabbert* v. *Wallace* was a case in which the court held that a mortgagee could not, under any form of declaration, recover for damages tor-

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tiously inflicted on the mortgaged property, when the mortgagee had no assignment of the mortgagor's right so to sue. *Cole* v. *Coon* was a case in which the court held that section 1709 of the code of 1871 was not a statute of limitations merely, but a positive statutory declaration that a tax title could not be assailed under certain circumstances; in other words, that the statute declared a legal bar to any sort of action, at law or in equity, under given circumstances, to assail a tax title. It must be plainly obvious that these cases, holding the doctrine that where the plaintiff could not, in any possible view, have a cause of action—could not, in any possible view, frame a declaration under which he could recover—have no application in a case like this, where the objection is not that Mrs. Schraag has no right of action at all, but simply and merely that she has not in this particular declaration stated a cause of action on which she could recover. Let us be clearly understood here. We do not concur in the view of counsel for appellant that the declaration does not state this ground of action at all, but we say it does state it just as fully as the Price case stated the ground of action therein. In one case, just as in the other, the declaration charges the company with negligence, but in a general way only. In neither does the declaration particularly define the specific kind of negligence, and yet in both it must be true, as held in the Price case, objection, not because of a total absence from the declaration of any charge of negligence on the master's part, but because simply of a failure to specifically state the precise negligence, cannot be made here for the first time. It may be suggested that the declaration was probably framed and the case tried in the court below before the decision in the Ballard case, and that on that account no demurrer was filed to the declaration, and no objection made on the ground of variance in the court below, and that appellant should be permitted to make the objection here for the first time. This, however, is not a tenable suggestion. Indeed, it is not urged at all by counsel for appellant. But besides all this, there is another

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most potent reason against entertaining the objection here for the first time, in addition to what has been stated, and that is this: The defendant itself, in the court below, asked this instruction (No. 8), which was given: "If Schraag was killed by the negligence of the yardmaster or those managing the switch engine, or by the negligence of both combined, the plaintiff in this case could recover, and is entitled to a verdict, provided Schraag himself was free from carelessness contributing to his injury; but, if Schraag could have seen the switch engine or its headlight in time to have stopped his train and avoided the collision, the plaintiff cannot recover, however negligent the yardmaster or those handling the switch engine were. If Schraag's carelessness in failing to see the switch engine or its headlight was one of the causes contributing to his death, then this plaintiff must fail, and it not entitled to a verdict." From this instruction it is plain that defendant itself invoked the doctrine that defendant was liable if Schraag was killed by the negligence either of the yardmaster or of those handling the switch engine, or by the negligence of both combined, unless, and only unless, the plaintiff was guilty of contributory negligence. In other words, the defendant not only failed to make the point now being made against the declaration as a matter of pleading, but it proceeded, throughout the entire trial, on the manifest theory that the contributory negligence of the plaintiff was the only defense available to the defendant.

The record shows that, when the rules of the company were introduced to show that those rules had been violated by the defendant in a great variety of instances, the defendant "admitted, by its counsel, that rules 92, 99 and 99c were all violated by the defendant, and that the defendant was guilty of negligence." It added to this admission its own request for the instruction No. 8, above set out. The case, therefore, is not only one in which no exception was taken in any way to the pleading in the court below, and in which no objection was made on the ground of variance in the court below, but one in which,

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in addition to all this, it actually places the cause, by said instruction 8, on the sole ground of the contributory negligence of the plaintiff. This court has held in *L. & L., etc., Co.* v. *Van Os, etc.*, 63 Miss., 440 (56 Am. Rep., 810); *Wilson* v. *Zook*, 69 Miss., 694 (13 So. Rep., 351), and *Clisby, Use, et al.* v. *M. & O. R. R. Co.*, 78 Miss., 937 (29 So. Rep., 913), that in such cases the party asking an instruction which places the defense on such single ground cannot be heard to complain here if it is held to the position it assumed in such instruction.

It is suggested in argument that appellant did raise the point in the court below by asking for a peremptory instruction. But asking for a peremptory instruction is entirely too perfunctory a mode of making so specific an objection. It was too general an objection. The court below doubtless never dreamed that this request for a peremptory instruction was meant to raise the point here pressed.

It is said, again, that the decision contravenes the Ballard case. It is in perfect harmony with the Ballard case. We held in the Ballard case that the plaintiff knew that the ladder was defective, and hence could not recover at common law, and so must recover, if at all, under chapter 66, p. 84, of the laws of 1898, making such knowledge no defense. But we held that said act was unconstitutional. Here we hold that this plaintiff can recover, not under the act of 1898, but under the common law, on the ground of the employment, without due care, by the company of incompetent employes, Dart and Earp, engineer and yardmaster. No common-law ground was involved in the Ballard case. Nothing but a common-law liability is here involved.

It is said, again, that our view contravenes the decision in the Bussey case. On the contrary, this decision reposes on that very case, wherein we expressly said (79 Miss., 609, 610; 31 So. Rep., 212): "It is said that chapter 65 has no relation to suits by employes at all—not even where the employe sues on the ground of negligence of the master alone; and the court be-

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low so held, notwithstanding section 2 of said chapter 65 plainly says, 'This act shall apply to all personal injuries of servants or employes received in the service or business of the master, where such injuries result in death.' This section cannot thus be read as blank paper. It expressly applies the principle of Lord Campbell's act—recoveries for injuries resulting in death—to all employes, when the injuries were due to the negligence of the master. It was part of a statutory scheme that had never assumed to deal with injuries caused by the negligence of fellow-servants in any way whatever, and it was not dealing with them." The Bussey case, the White case, and the Woolley case directly support our view.

It is said there really is no variance, and that, if that objection had been made, it would have been shown that the evidence corresponded with the first count in the declaration. We think the variance is perfectly manifest between the testimony and both counts. The variance is in this: that, while the second count proceeds on a general charge of negligence, there is no specific allegation of the precise negligence of the company in furnishing incompetent employes. It is, in its nature and in its extent, the same sort of variance that was shown in the Price case. But it was nothing but a variance, and, to have been availed of, must have been taken advantage of in the court below. The very furthest reach of the point pressed here would simply be to reverse and remand the cause for amendment of the declaration. But it surely must be too plain for discussion that if the defect in the pleading be amendable, it must, perforce, be cured, in case of failure to object below, by sections 718 and 746 of the code of 1892, as construed in the Price case, *supra*.

We have not ourselves set out in detail the evidence, but the reporter will do that—especially the testimony of the witness, Schmidt, and the testimony showing the experiments demonstrating the inability of Schraag to have stopped his engine in time to prevent the collision after he saw the switch engine. We only add that the testimony shows that the railroad company

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Statement of the case.

discharged this yardmaster and all the other employes connected with the switch-engine crew immediately after the happening of this injury.

On this ground, therefore, the judgment is affirmed.

TRULY, J., dissented.

MALACHI C. BUFFINGTON v. MARTHA THOMAS.

1. WILLS. *Holograph. Private letter. Request for secrecy.*

A letter, testamentary in its character, wholly written, dated and signed by the testator, is a valid holographic will, although it contains a request that the person to whom it was addressed should keep its contents private.

2. SAME. *Request for answer. Contingency.*

An holographic will, in form a letter reciting that the testator was in bed, did not know that he would live until the next day, and requesting an answer from the person to whom it was addressed, is not dependent upon a contingency, although it was never answered and the testator lived several months after writing it.

FROM the chancery court of Yazoo county.

HON. ROBERT B. MAYES, Chancellor.

Buffington, the appellant, contested the will of his wife, Mamie; Mrs. Thomas, the appellee, was the contestee. From a decree probating and establishing the will the contestant appealed to the supreme court. The will was in form a letter in the following words:

"SAN ANTONIO, TEX., Dec. 25, 1898.

"*Mr. Edward Drenning.*

"DEAR FRIEND—This leaves me in bed with high fever. I do not know whether I shall live to see morning. I came to West Texas for my health and did very well until lately. I was

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taken with fever, from which I may never recover. You have from childhood always shown yourself a friend. Now, I am sick, I have one more favor to ask: in case that I die see that old Buffington has nothing of mine, not even a lock of my hair. Eliza did what she could for me and I want her to have our home in Yazoo City. Buffington has not given me a copper. I could say more, but am too sick. Answer at once.

"Truly yours, MAMIE BUFFINGTON.

"(This is private.)".

The case was tried by the chancellor, a jury having been waived by the parties, on an agreed statement of the facts, which was as follows:

"It is agreed in this case that the letter offered for probate as the last will and testament of Mamie Buffington is wholly in the handwriting of the said Mamie Buffington and signed by her. It is further agreed that the said Mamie Buffington went to Texas for her health, but did not die until the 9th day of June, 1899, and that Edward Drenning, the party to whom the letter was addressed, never made any reply to the same and never had any other or further letter from the said Mamie Buffington.

"No question is raised as to the marriage of Malachi C. Buffington and Mamie Buffington, and the question is not raised as to the right of Martha Thomas to take under the will if the same be declared to be a valid will."

Barnett & Perrin, for appellant.

The facts in this case are agreed upon, and hence the construction of the letter as to whether it should be admitted to probate as a last will and testament is one of law. Granting for the sake of argument that the letter is testamentary in character, under the agreed state of facts it should not be admitted to probate because it is contingent in its nature and the contingency did not happen. What construction shall we put

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upon the language of this letter? Of what was Mrs. Buffington expecting to die? When was the dissolution looked for? Evidently the writer could have had reference only to her then present state. It was the then present sickness, the fever, that was in her mind, and not her death from any other cause; and yet we find that she did not die for more than six months afterwards, of what disease is not known, for no proof was offered with regard thereto. The letter should be construed as a whole, and not by sections or sentences, and if this be true, surely the words "In case that I die" must relate back to the sickness before referred to, and can with no degree of fairness be construed into a general expression. It seems necessarily to follow that the only intention expressed in the letter was what she wanted done in case her then present sickness terminated fatally. What her intention was six months afterwards is impossible to tell. Nowhere in the letter appear any words of a general character indicating the uncertainty of life or the certainty of death, and we therefore conclude that the phrase "In case that I die" can only relate to the then present ailment—namely, the fever from which the writer was suffering. Even if the letter be of a testamentary character, it is based upon a contingency, and the contingency not happening the same is void as a testamentary document. *Magee* v. *McNeil,* 41 *Miss.,* 17; *Maxwell* v. *Maxwell,* 3 Met. (Ky.), 101; *Parsons* v. *Lanoe,* 1 Ves., 189; 29 Am. & Eng. Ency. Law [1st ed.], 131.

The most that can be said of it is that the epistle is in the nature of instructions to a friend to take the proper steps to see that the wishes therein expressed should be carried out. The closing expression "answer at once" shows that even the writer was expecting further light on the subject. The parenthesis "This is private" shows that what advice Drenning should give would be confidentially received, and what information was given him by the letter should be treated in the same manner. The expression "I could say more, but am too sick" shows still

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Brief for appellant.

further incompleteness and is capable of more than one interpretation. It could mean that she could say more derogatory to Buffington, but it could also mean that she could say more with regard to the disposition of her property. It is the *animus testando* which makes any instrument a will or *vice versa*. *Boofter* v. *Rodgers*, 52 Am. Dec., 680; *McGee* v. *McCamps*, 1 McCord, 517; *Coombs* v. *Jolly*, 3 N. J. (Eq.), 625.

The identical paper must have been written *Animo Testandi*. *McBride* v. *McBride*, 26 Grat., 481; *Edwards* v. *Smith*, 35 Miss., 197; *Young* v. *Wark*, 76 Miss., 829; *In re Estate Richardson*, 15 L. R. A., 635; *Morsell* v. *Ogden*, 24 Md., 382; *Estate of Mead*, 62 Am. Dec., 244; *Lungren* v. *Swartzwelder*, 44 Md., 482.

Harris, Powell & Harris, on the same side.

This case must be reversed because there is no proof that the alleged testatrix was of sound mind, the law not indulging any presumptions in her favor. Code 1892, § 4488; *Martin* v. *Perkins*, 56 Miss., 210.

First—Was the letter from Mamie Buffington to Mr. Drenning intended by her to be her last will and testament in and of itself alone? Second—Or was it intended by her as a memorandum or intimation for his guidance in the preparation by him for her of a more formal and more complete will? Third—Or was it only the outpouring of a sick and nervous wife over some fancied grievance, and written in confidence to an old friend, and neither understood nor intended by her to be a final disposition of her property?

We unhesitatingly affirm that one or the other of the last two theories is the correct view to be taken by the court. The letter only expresses a wish to dispose of a small part of the writer's property, and she must have known that old Buffington would get the rest, unless a will was made conveying the rest of it. Undoubtedly it was to have Drenning do this very thing that caused the letter to be written. The letter was evidently

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Brief for appellee.

written under a high nervous strain, possibly caused by some fancied slight of her absent husband and forgotten as soon as written. As long as nervous, emotional women exist such things may happen in the best regulated families. Buffington may have been, and possibly was, a loving and devoted husband, and this letter by a wife, away from home and sick, but the temporary expression of a nervous mind. If temporary ebullitions of passion, as expressed in this letter, are to assume the grave dignity of testamentary dispositions, then no husband, however kind, is safe from the temporary pique or jealousy of his wife. Should this court say that stray letters like this, the mere expression to an old friend of temporary passion, when the mind is despondent and the body diseased, have all the requirements of legal documents in diverting the descent of property between "Those whom God hath joined together," we would still say, Long live the court, God bless our homes, God bless our wives, but God pity the man who has a nervous wife, who is too ready with her pen. We refer the court to the case of *Lungren* v. *Swartzwelder,* 44 Md., 482.

Ricketts & Peyton, for appellee.

The agreed statement of facts in this case brings it to a single issue: whether the letter of Mamie Buffington constitutes a valid will under our law.

Take into consideration the circumstances surrounding and which led up to the writing. This woman, Mamie Buffington, suffering with consumption, had gone to Texas in search of health. She was an ignorant woman. Her condition had become serious, and at the time of writing the letter she was in bed with fever. She writes the letter to Drenning, her friend, making disposition of her property after her death, with confidence that Drenning, a lawyer, would upon her death, armed with this letter as his authority, turn over her property in Yazoo City to her sister Eliza. The letter fulfills the requirements of law. In the case of *Anderson* v. *Pryor,* 10 Smed. & M., 620,

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this court has defined the requisites of a will of this kind. They say: "A letter or letters written wholly in the handwriting of the decedent, in which he expresses clearly an intent to make a disposition of his property after his death, are testamentary, and may be admitted to probate as the will of the writer." What would the "answer at once" reasonably suggest? Simply that she desired to know whether the letter had reached Drenning safely, if she lived long enough to get a reply from him, and was equivalent to saying: "Please acknowledge receipt." In adding to her letter "This is private," testatrix simply expressed a desire that it should not be made public in her lifetime. *Habberville* v. *Broening,* 4 Vesey Jr. P., 199 note; Underhill on the Law of Wills, Vol. 1, pp. 51, 52; *Morrell* v. *Dickey,* 1 Johns (Chan.), N. Y., 153; *Gratton* v. *Appleton,* 3 Story (U. S.), 755.

It is shown by the pleadings, and not denied, that the testatrix was suffering with consumption, was seriously ill at the time of writing the letter. This condition, being once established, is presumed to have continued until her death. 1 Greenleaf on Ev., sec. 41; *Newman* v. *Bank,* 67 Miss., 770. Should we concede for argument that this is not true, the case of *Redhead* v. *Redhead,* 83 Miss., 141, would certainly govern. In the case at bar the only contingency that is hinted at is the death of the testatrix, like the Redhead case. She wrote the letter because she wanted to dispose of her property after her death. She did not say, as counsel ingeniously attempt to argue, "In case I do not recover from this fever," or "in case I die tonight."

In every case cited by opposing counsel the writer was about to be subjected to some certain danger, and it was his purpose to make provision for the settlement of his business affairs in the event of the happening of some particular event named in the instrument.

The *animus testandi* is the intention in the mind of the testator to make or have made a certain disposition of his

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Syllabus.

property after his death. The testamentary intent is manifested. "I want Eliza to have our home in Yazoo City." *Eaton* v. *Brown,* 193 U. S., 411.

Argued orally by *R. B. Ricketts,* for appellee.

CALHOON, J., delivered the opinion of the court.

The instrument was properly probated as a will. The acute attack of fever was the inducement to the woman to indicate her last wishes, and her dominant idea was to express them, and to say what she wanted "in case I die," and she gives her reason for the wish. The request to "answer at once" perhaps indicates only the desire to know whether the letter reached its destination. There is no presumption that it was designed to alter its nature. And so of the words "this is private." From the purport of the whole paper, manifest reasons would militate against publication during the life of the writer. *Anderson* v. *Pryor,* 10 Smed. & M., 620; *Redhead* v. *Redhead* (Miss.), 35 South., 761; "All opinions," *Eaton* v. *Brown,* 193 U. S., 411.

Affirmed.

CITY OF JACKSON v. WILLIAM A. WHITING ET AL.

1. MUNICIPALITIES. *Incorporation. Code* 1892, § 2921. *Laws* 1898, *p.* 90. *Constitutional law. Constitution* 1890, *sec.* 88. *Executive and legislative power.*

Code 1892, § 2921, Amended Laws 1898, p. 90, authorizing the governor to pass upon and approve applications for the incorporation of cities, towns, and villages not previously incorporated, is constitutional and does not submit to the executive questions belonging to the legislative department of the government, under Constitution 1890, sec. 88, providing that the legislature shall pass general laws for the incorporation of municipalities.

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Syllabus.

2. SAME. *Annexation of territory. Separate incorporation of adjacent territory. Code* 1892, §§ 2912a, 2913. *Laws* 1902, *p.* 154. *Code* 1892, § 2921. *Laws* 1898, *p.* 90.

Where a municipality initiates proceedings by the passage of an ordinance for the annexation of adjacent unincorporated territory under Code 1892, §§ 2912a, 2913, Amended Laws 1902, p. 154, authorizing the same, but providing that the ordinance should not become operative until published for thirty days, etc., and the electors of the territory sought to be annexed begin proceedings about the same time to form a separate municipality embracing the same territory, under Code 1892, § 2921, Amended Laws 1898, p. 90, authorizing the same to be done on three weeks' notice, and the governor approves of the separate municipality before the city ordinance becomes operative, that one of the two proceedings will be treated as effectual and prevailing over the other in which the initial steps were first taken.

3. SAME. *Appeal. Issue in Circuit Court. Time.*

The question whether a contemplated extension or contraction of the limits of a municipality be or be not reasonable, which is to be tried on an issue to be made up on an appeal to the circuit court from an ordinance proposing the same under Code 1892, §§ 2912a, 2913, Amended Laws 1902, p. 154, authorizing such procedure and appeal and providing for such issue, is to be determined by the facts and circumstances at the time of the adoption of the ordinance.

4. SAME. *Striking issues from files.*

Where a municipality, upon appeal from its ordinance proposing the annexation of adjacent territory, tendered in the circuit court the statutory issue, averring that the annexation proposed by its ordinance was reasonable, it was error to strike the issue so tendered from the files on a mere inference that the territory sought to be annexed was incorporated territory at the time the ordinance was adopted.

5. SAME. *Code* 1892, § 2921. *Laws* 1898, *p.* 90. *Petition for charter. Governor's power and duty.*

In acting on a petition, under Code 1892, § 2921, Amended Laws 1898, p. 90, providing for the incorporation of unincorporated hamlets, the governor is required only to determine whether or not the petition is sufficient and sufficiently signed and whether it has been published as required by the statute. If these ques-

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Brief for appellant.

tions be resolved affirmatively, he is required to issue his proclamation of incorporation and is without power to enlarge or contract the proposed municipality.

FROM the circuit court of, first district, Hinds county.

HON. DAVID M. MILLER, Judge.

The city of Jackson, plaintiff in the circuit court, was the appellant; Whiting and others, defendants in the circuit court, who had appealed to that court the city ordinance proposing to extend the city limits, were appellees in the supreme court.

The facts are fully stated in the opinion of the court.

McWillie & Thompson, for appellant.

At the time of the passage of the ordinance enlarging the boundaries of Jackson, there can be no question but that the municipal authorities of the city had the right to pass it. The ordinance, when passed, was a valid ordinance. It did not take effect at once in the sense of extending the city limits instantly, but it was a valid ordinance, and it invested the city with a right. The right was to have the limits extended, as provided in the ordinance, by mere lapse of time, unless an appeal was prosecuted within the time limited therefor, and if an appeal were so prosecuted, to have the limits extended unless upon an issue made, as to the reasonableness or unreasonableness of the proposed extension, it should be adjudged by the circuit court that the proposed extension was unreasonable. The right just stated was vested in the city when the ordinance was passed. The right stated could not be defeated by the governor of the state, it could only be defeated in the way provided by the statute for so doing. At the time of the passage of the ordinance, Duttoville was not incorporated, nor was the territory which the city proposed to annex incorporated territory. If there be evidence in the record (and if there be it is slight, too slight to predicate a judgment of it) showing or tending to show that the inhabitants of Duttoville were getting up a petition or publishing one by posting, asking the

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Brief for appellant.

governor to incorporate that territory, these acts and doings by the inhabitants had no legal effect. The petition was not presented to the governor until long after the passage of the ordinance by the city of Jackson. It is shown of record to have been presented to the governor on the 13th of August, 1903, and the ordinance was passed on the 23d of July, 1903. Duttoville was not chartered as a village until the 20th of August. The acts and doings of the people of Duttoville, before presenting their petition to the governor, had no legal effect whatever on the rights of the city of Jackson. When this case on appeal from the municipal authorities reached the circuit court, the law provided in express terms what should be done with it there. It is provided, § 2913, Code 1892, and by the amendment of 1902, that the case was to be tried on an issue to be made up, "and the question shall be whether the proposed extension of the corporate limits be or be not reasonable." The city of Jackson acted upon the idea that the circuit court would follow the course of procedure laid down in express terms for its guidance by the law of the state. So assuming, it tendered an issue in accordance with and in the very language of the statute. The appellees would not join therein, nor would the circuit court require them to do so. They carried the court away from the positive mandate of the statute for its guidance, and brought into the case the consideration of supposed political or governmental difficulties that might arise from obeying the law.

If the statutes be inconsistent, this was no excuse for the circuit court disobeying direct commands for its government. The provisions of the code about the incorporation of hamlets and unincorporated villages pertains to an entirely different subject-matter. Sec. 2913 of the code, and the amendment thereto, directs what was to be done in the circuit court and by the circuit court. Sec. 2921 may contain directions to the chief executive of the state, but certainly none for the government of the circuit court. The governor of the state undertook

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to follow, and doubtless thought he was following, sec. 2921 when he granted the Duttoville charter, and believed that it laid down the rule for his conduct in the matter then before him. He must have acted upon the idea that his grant of the charter to Duttoville would not and could not be binding upon the circuit court in the trial of the appeal in this case, and no doubt he thought that the circuit court would follow the statute laying down the rule for its guidance.

The only question in this case is this: Shall the circuit court be compelled to obey the statute, or may it, at pleasure, depart from the rules of procedure laid down for its government? This court, we feel assured, will not anticipate political or governmental troubles which may be imagined to result from following a statute, and because thereof ignore the statute. If the court follows the statute, the city of Jackson is entitled to a trial as to whether the proposed extension of its boundaries be reasonable, and if a trial of that issue shall result in its favor, then by the language of the law itself, the boundaries are extended.

How anything that could be done by the governor or by the executive department of the government can defeat positive legislation, we cannot understand. *Ita lex scripta est.* Upon appeal in a case like this, an issue shall be made up for trial in the circuit court and that issue is whether the proposed extension of the corporate limits be or be not reasonable. Surely the presentation of the petition to the governor for the incorporation of Duttoville does not render wholly ineffectual the ordinance of the city of Jackson passed before the petition was so presented. The ordinance of July 23, 1903, was not a dead thing. The mere lapse of time would have put it into full operation without an appeal. Could the governor repeal that ordinance and wholly destroy it? If so, by what authority? Can any act of the governor control the circuit court in the trial of a case when the statute itself says what the court shall do? If so, by what authority? The circuit court itself could not

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Brief for appellant.

defeat the ordinance of July 23, 1903, otherwise than by adjudging, on the verdict of a jury to that effect, that it was unreasonable, and yet in this case the circuit court repudiated the law laid down for its government, became confused and destroyed the ordinance, and it did this upon a mere motion based on a mere conjecture.

Suppose it should result from inconsistent legislation that two municipalities covered the same territory. This would not be the fault of the courts, nor would it be any reason for the courts to disregard a plain statute. It would be a political or governmental complication for legislative correction, this and nothing more. Instances are not wanting of two municipalities covering the same territory, and no great crisis in the affairs of men resulted as a consequence.

Williamson & Wells, on the same side.

With the exception of constitutional limitations, the power of the legislature over public corporations is supreme; it may change, divide, and even abolish them, as it deems best. *Dartmouth College* v. *Woodward,* 17 U. S., 518; *Girard* v. *Philadelphia,* 74 U. S., 1; 1 Dill. Municipal Corp., 139; *Vestal* v. *Little Rock,* 11 L. R. A., 778 and note. This right of the legislature has been fully discussed and adjudicated by this court, and the law in this state is laid down in the following language:

"In their creation or abolishment the legislature is under no legal compulsion to consult the wishes of the inhabitants. . . . Their charters are altered or repealed, and their boundaries are contracted or enlarged, at the will of the general assembly, either with or without the consent of the persons affected thereby, as the legislature may see fit." *Martin* v. *Dix,* 52 Miss., 53.

If the lower court was correct in its ruling on the law in this case, no suburb of any city in the state of Mississippi, which contains as many as one hundred inhabitants, can ever

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Brief for appellant.

be included in the corporate limits of the city, if such action be opposed by two-thirds of the electors residing in the suburb.

It might be desired by a large majority of the inhabitants. It might be desired by all the taxpayers. It might be conceded that the proposed extension of the city limits was entirely reasonable. The law providing for the extension of the city limits may have been strictly complied with, but if two-thirds of the electors, none of whom may be property owners or taxpayers, who learn of the proposed extension, choose to sign a petition praying for separate incorporation, and publish the petition for three weeks, and present it to the governor, the ordinance extending the city limits will be defeated.

The effect of a supersedeas is not to vacate or annul the judgment or decree, but merely to stay further proceedings upon it, and leave matters in the condition in which they were when the supersedeas took effect, and until the appellate court can hear the parties on the questions involved. *Powell* v. *Florida Co.*, 26 So. R., 700; *Randles* v. *Randles*, 67 Ind., 107; *Curtis* v. *Root*, 28 Ill., 367; *Gruner* v. *Westin*, 66 Tex., 209; *Martin* v. *Land Co.*, 94 Va., 28; *People* v. *Stephenson*, 98 Mich., 218.

The question which was involved in the appeal of the instant case to the circuit court was whether or not the extension of the corporate limits of the city of Jackson was reasonable or unreasonable, and the appeal from the ordinance and the bond given, only operated as a supersedeas until the appellate court could hear the parties on that issue. But the lower court struck out the tender of this issue and dismissed the case for the reason that, pending the appeal to the circuit court, a portion of the territory sought to be included in the city limits had become separately incorporated as the "Village of Duttoville" and had been subsequently proclaimed as the "Town of Duttoville."

We submit that the Chapter on Municipalities should be given a reasonable construction by the court. The sections of that chapter providing for the enlargement of cities and towns

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and for the incorporation of hamlets and unincorporated villages, should be so construed as that under proper and reasonable conditions, the corporate limits of growing cities could be enlarged, even though two-thirds of the electors in the suburb are opposed to it, and so that hamlets and unincorporated villages could secure benefits of incorporation only where the public interest required it.

These sections should not be so construed, so that in every instance where it was sought to reasonably enlarge the boundaries of a city by the annexation of its suburbs, the ordinance can be defeated by the simple expedient of a petition, signed by two-thirds of the electors, for separate incorporation as a village, and by an appeal from the ordinance of enlargement, in which the issue of the reasonableness of the enlargement is not allowed to be tried because of the separate incorporation pending the appeal.

Under such a construction of the law as was adopted by the court below, the cities and large towns of the state will become surrounded by hamlets and villages, over which they can exercise no jurisdiction or control, which would be a constant menace to the public health of the city, a haven of refuge for thieves, pickpockets, and midnight marauders, and the sanitary and police officers of the city would be powerless in the premises. In cases of epidemic or infectious diseases the city would be powerless to impose any restrictions or to enforce any police or sanitary regulations except upon those who resided within the restricted corporate lines, and yet would be surrounded by a large population, who are in reality a part of the city, but who have become incorporated under the claim and pretense that they constitute a hamlet or village.

Sec. 2921 of the annotated code, providing "How hamlets and unincorporated villages may become incorporated," is in violation of the constitution.

Sec. 88 of the constitution of the state of Mississippi makes it apparent that the power to create municipal corporations is

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Brief for appellees.

vested exclusively in the legislative department of the government. If it is conceded that the power to create such corporations is vested exclusively in the legislature, the question arises, Can this power be delegated, and if so, to whom and to what extent?

We admit that the power can be delegated to some extent, but it cannot be done to the extent attempted.

The fundamental idea of a municipal corporation proper, both in England and in this country, is to invest compact or dense populations with the power of local self-government. It is necessary in so doing to draw the lines and define the limits of the place and people to be incorporated. This is under our laws and constitution a legislative function. 1 Dillon Mun. Corp. (3d ed.), sec. 183; *Galesburg* v. *Hawkinson,* 75 Ill., 153; *People* v. *Carpenter,* 24 N. Y., 89; *People* v. *Bennett,* 29 Mich., 451; *People* v. *Nevada,* 6 Cal., 143; *Jeringhan* v. *Madisonville,* 102 Ky., 313; *In re North Milwaukee,* 33 L. R. A., 638.

Wells & Wells, for appellees.

Duttoville took the initiative of her own accord, and did not start after the city had started, in an effort to cut off the city. Duttoville, having begun three days before Jackson in the race which Jackson precipitated by attempting to prevent the incorporation of Duttoville and to extend its limits over the territory of the proposed village of Duttoville, was favored by the statute law, Laws 1898, chapter 74, in the fact that in the incorporation of a village the petition has to be posted or published only three weeks, while in the extension of the limits of a town or city, Laws 1902, chapter 103, the ordinance must be posted or published for three weeks, and also one month must elapse from the passage of the ordinance before it can become operative.

Duttoville prepared and posted her notices on July 20th, and on August 20th Governor Longino completed the proceeding by his proclamation incorporating the village and thus making it

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incorporated territory. Jackson only took her first step in her proceeding on July 23d, and as one month had to elapse besides the other steps being taken before it was completed and jurisdiction given, that even had no appeal been taken it could not have been completed before August 23d or three days after Duttoville had been granted full power and jurisdiction, and become a legal entity, and after the territory sought by Jackson as unincorporated territory had become incorporated territory. It will also be seen that the last step of the three necessary to be taken by Jackson was not taken until September 2d—to wit, the adjudication by the Board of Mayor and Aldermen as to the fact of publication and notice, until which the extension was not legal.

But it is insisted by opposing counsel that the ordinance passed on July 23d was "not a dead thing." While it may be true that the ordinance is not a dead thing, the statute itself shows that it is not a live thing, because it had no force or effect, nor did it grant any power to the city in any manner or form over the territory.

But if that ordinance passed by the city of Jackson on July 23d was not a dead thing, what about the petition for incorporation posted on July 20th by Duttoville? Was that a dead thing? Surely not. If it be true that he who took the first step in the proceeding intrenched himself impregnably, then Duttoville took that first step. If it be true that he who first completed his proceedings won, then Duttoville is the victor and must be awarded the palm.

But the court will see that the ordinance of the city of Jackson is not yet in effect, due to the appeal. On December 26th Duttoville was reclassified as a town of five hundred and forty inhabitants. Suppose this court should reverse this case and send it back for a jury trial "on an issue to be made up there," and the question should be "whether the proposed extension be or be not reasonable." Would the trial be as of date July 23d, or at the time of trial? Most assuredly it would be

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as of date and under conditions at the time of trial. If not, the statute would have read "and the question shall be whether the proposed extension was or was not reasonable." Would it be a reasonable extension if it was illegal? Most certainly not. If the issue be on the facts as of the date of trial, then why will it not be necessary for the court to give a peremptory instruction for Duttoville, because of the fact that Duttoville is a town of over five hundred inhabitants, which cannot be annexed or combined except by its consent as provided for in the first paragraph of sec. 1, chapter 103, Laws 1902? It would indeed be a vain thing to submit to a jury to pass on its reasonableness a case of extension illegal on its very face under the same law that Jackson insists should be enforced by a jury trial.

It has been suggested that if the law be followed as written it will end each time on the suburb incorporating itself in the shorter time allowed for incorporation over extension, and thus no extension be possible of a city over an unwilling suburb. Our answers to this are as follows:

1. We distinguish this case at bar from such a supposition in that Duttoville took the first step and Jackson tried to defeat her, not Duttoville tried to defeat Jackson.

2. If following the law will end in a series of villages and towns around the cities which villages and towns do not desire to unite with the city and that is an evil which should be corrected, then it should be done by legislative, not judicial, enactment.

3. But the law contemplates two or more adjoining each other and allows them to stay separate unless they voluntarily unite. Laws 1902, ch. 103, p. 155.

It has also been suggested that Duttoville before incorporation was not "any unincorporated village, town or city," as is provided by law to be incorporated under chapter 74, Laws 1898.

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Brief for appellees.

Our answer to this is as follows:

Whose duty is it to inquire into the facts, and if proper issue the proclamation? Manifestly the governor. Did he perform that duty? He did. Did he consider it carefully? The petition shows that it was held up from August 13th to August 20th, and it was argued and fought over there fully by the city of Jackson, and Jackson lost. Was there any evidence taken in the lower court when our motion was made in regard to Duttoville and the proclamation of incorporation by the governor so as to attack its validity? None in the world. Its validity was never questioned there, or here in any brief now on file for appellant, and both are now on file. Then can it be said that now in the supreme court a collateral attack, supported by no evidence whatever, save that Duttoville lies alongside of Jackson, can be made on the solemn proclamation of the governor, who examined thoroughly into the matter; and that said proclamation can now be declared null and void, when it is not only regular on its face, but also absolutely regular and valid, and all the proceedings leading up to it are valid, as shown by the record itself? Will this court, merely on the statement of counsel as to what they want to prove in some other trial, sustain this collateral attack? Such a proposition is preposterous.

Alexander & Alexander, on the same side.

The most that can be said in behalf of either party is that they have both strictly followed the statute applicable in each case, and under these statutes Duttoville became conclusively first a village before the ordinance could in any event become operative, and afterwards became a town before the appeal was decided and before the ordinance can now become operative.

But counsel for appellant seem to treat lightly the proceeding before the governor as if it was an unauthorized interference with the statutory rights of the city. They forget that

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Brief for appellees.

the statute under which the citizens of Duttoville acted and under which the governor issued his second proclamation is as binding as the statute under which the city acted. When, where, and how does § 2912 (*a*) of the code become any more the law of the land than § 2921 or § 2918? If the city says it followed the statutory proceeding, we reply that Duttoville followed a statutory proceeding just as plainly marked out and applicable. The proceeding before the governor was in one respect of more dignity than the ordinance of the city for enlarging its boundary, in that the ordinance is not conclusive, but subject to appeal, and to the reconsideration by the board, and to the decision of a jury, whereas the proclamation of the governor incorporating a town and classifying it is conclusive, and no remedy is given by appeal from it.

The act of 1902 forbidding the annexation of territory which is already incorporated is merely an amendment of the general law as to municipalities. It is not competent by a general statute extending municipal limits to annex part of an incorporated borough. *Darby* v. *Sharon Hill,* 112 Penn. St., 70; *McAskie's Appeal,* 154 *Ib.*, 24; *Devoe's Appeal,* 56 *Ib.*, 164.

The court must determine as a judicial question whether the law is complied with by the municipal authorities. This objection is jurisdictional. *Forsythe* v. *Hammond,* 142 Ind., 520. The city cannot extend so as to take in a municipality of a lower class. *City of Omaha* v. *South Omaha,* 51 Neb., 178; 1 Dillon on Mun. Corp. (4th ed.), sec. 184; *Ib.*, sec. 419.

If it does not appear that the territory as a whole should be annexed, it is error to annex part of it. Dillon on Mun. Corp. (4th ed.), sec. 419; *Vestal* v. *Little Rock,* 4 Ark., 321; Smith Mun. Corp., sec. 419.

The ordinance is of course entire, and if illegal as to part it fails altogether. It was in the power of the aldermen of Jackson to pass separate ordinances annexing distinct parts of the territory. For reasons of its own it put the whole matter in one ordinance, and of course the courts and jury cannot make

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Brief for appellees.

the boundary for the board. If part of the territory is already incorporated, the whole ordinance fails.

It is true the only issue of fact to be tried by a jury on appeal is the reasonableness of the ordinance. Certainly if the ordinance is obviously void, the court will not be required to do a vain thing and proceed under it. The city could not annex incorporated territory, and if it be shown to the court that the territory sought to be annexed was incorporated, the court, however this fact be shown, should dismiss the proceeding. Suppose the city of Jackson should pass an ordinance annexing the city of Meridian or Vicksburg, and an appeal were taken to the circuit court, would that court be required to submit the reasonableness of the extension to the jury? Suppose the ordinance of the city appeared on its face to have been passed at a wrong place, or by a minority of the board present, or not to have been published at all or improperly published, would the court be required to ignore such matters? We think not. Surely the court would not require the parties to introduce scores of witnesses to prove the reasonableness of an ordinance when it clearly sees that the ordinance is not enforceable for reasons of law.

It is contended by appellant that if our view of the law is correct no suburb of any city can ever be included in the corporate limits, and the rule *ab inconvenienti* is invoked. The answer to that is: First—That the court was not concerned with the wisdom of the legislation on these two subjects. If each party followed strictly a statutory right and Duttoville became under the statute an incorporated town before the ordinance became operative, the evil, if such you can call it, is not one for the court, but one for the legislature to correct. Second—It is an erroneous assumption that the legislature looks alone to the interest of the city. It looks as much to the interest of the citizens of the territory to be annexed. It may be a law of nature that the big fish eat the little ones, but it is not intended to be the law of municipalities. The rights are often trampled upon;

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that cities under the impulse of pride as to size or population, or under the necessity of greater revenue, are always under the temptation to annex territory, and to do so prematurely. We deny that the city of Jackson has any common law right, or any statutory right, or any moral right, to take in the citizens of Duttoville without their consent. The only right it has is a purely statutory right, and in this statute the rights of the people of the adjacent territory are jealously protected. If there is any public policy which encourages the building of cities with all their multiform vices and political corruption, we are not aware of it. We have been taught that the right of local self-government is the right most emphasized under our form of government. It is said, however, that under the rule we invoke whenever a city begins to take steps to annex territory, the people of the territory will rush to the governor and get a charter and defeat the will of the city. The answer to this is: First—That if two-thirds of the electors in the territory do not want to be annexed they have a right to go to the governor and have themselves organized into a municipality. The consent of the governed is never lost sight of in our government. In the second place, if the city furnishes advantages and is giving a beneficent municipal government, the territory to be annexed cannot be presumed to oppose such annexation, and the danger conjectured is a very remote one. In the next place, the governor cannot be presumed to lend himself to a fraud.

Argued orally by *Ben H. Wells,* and *R. H. Thompson,* for appellant, and by *W. Calvin Wells, Jr.,* and *C. H. Alexander,* for appellees.

TRULY, J., delivered the opinion of the court.

On the 23d day of July, 1903, the board of mayor and aldermen of the city of Jackson at a regularly called meeting adopted an ordinance extending the corporate limits of the city. This ordinance was duly published as required by law, but

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before the expiration of thirty days after its enactment certain citizens appealed to the circuit court, protesting against said ordinance becoming operative. At the ensuing term of the circuit court, when the case came on for trial, the citizens who had appealed moved to strike out the tender of issue which had been made by the attorneys for the city. The only material ground assigned by the motion to dismiss the tender of issue was this: "A large part of the territory included by the ordinance is the incorporated town of Duttoville, which protests against amalgamation, and cannot, by the proceeding, be brought into Jackson. Said territory is that described in paragraph 3 of the ordinance." After considering this motion, the circuit judge entered the following order: "Came on this day to be heard the motion of the appellants to strike out the tender of issue by the city of Jackson and to dismiss the proceeding, and the same, together with the evidence adduced in support thereof, having been argued and considered, it is ordered that the motion be sustained, and the proceeding be dismissed; to which order and judgment the city of Jackson excepted." The evidence on which this order was based, as disclosed by the record herein, was: (1) Charter of the village of Duttoville, with all accompanying papers. (2) The charter of the town of Duttoville, with all accompanying papers. (3) The admission that a part of the territory described in said charters was embraced in the ordinance enlarging the limits of the city of Jackson. Among the papers accompanying the charter of the village of Duttoville and attached to the proclamation of the governor incorporating said village is an affidavit of certain individuals stating that the notice attached thereto "was posted in three conspicuous places for three consecutive weeks." This affidavit was made on the 13th day of August, 1903. The paper attached to that affidavit, denominated a "notice," is a petition setting forth the territorial limits of the proposed village of Duttoville, and purporting to be signed by two-thirds of the electors resident therein. It further appears from a

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recitation in another paper attached to said proclamation that the petition was submitted to the governor on the 13th day of August, 1903, the same day that the affidavit of posting was made. The governor's proclamation incorporating the village of Duttoville and specifying its boundaries as defined in the petition is dated the 20th of August, 1903. The record also discloses that subsequent to this action, but before the trial in the circuit court, by proper proclamation, the village of Duttoville was by the governor elevated to the rank of a town, but, in our opinion, these subsequent proceedings were not material, and do not affect the question at issue.

The laws bearing on the questions here involved are: § 2921, Code 1892, as amended by ch. 74, p. 90, Acts 1898, which is as follows:

"Sec. 2921. *How unincorporated Villages, Towns, and Cities May Become Incorporated.* Whenever a petition, signed by two-thirds of the electors of any unincorporated village, town, or city, shall be presented to the governor setting forth the metes and bounds of their city, town, or village, stating the number of inhabitants therein and praying incorporation, he shall inquire into the facts. If he finds the petition sufficient and sufficiently signed, and it be shown to his satisfaction that it has been published in full for three weeks in some newspaper of the proposed municipality, if there be one, and if not, by posting in at least three conspicuous places in the village, town, or city, and that the place contains at least one hundred inhabitants, he shall, by proclamation, declare such village, town, or city incorporated, defining its limits and boundaries, and fixing its name as the village, town, or city of ——. Such proclamation shall be filed in the office of the secretary of state, and remain a record thereof."

And § 2912a and § 2913, Code 1892, as amended by ch. 103, p. 154, Acts 1902, which are, so far as pertinent to this issue, as follows:

"Sec. 2912*a*. The limits and boundaries of the existing

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cities or towns shall remain as now established until altered, as herein provided. To enlarge or contract the boundaries of a city or town by adding thereto adjacent unincorporated territory, or excluding therefrom any part of the incorporated territory of such municipality, it shall be necessary for the municipal authorities to pass an ordinance defining with certainty the territory which it is proposed to include in or exclude from the corporate limits and also defining the entire boundary as changed.

"The ordinance herein provided for shall not become operative until one month after the passage thereof, and until the same shall have been published in some newspaper of the city or town for three weeks, if there be a newspaper therein, and if none, then a newspaper having a general circulation therein for that time, and in other events by posting written or printed copy of the ordinances of said city or town in not less than three public places for said time, when it or they shall become operative, unless an appeal be prosecuted.

"Sec. 2913. The appeal from the ordinance shall be to the circuit court, and shall be tried on an issue to be made up there, and the question shall be whether the proposed consolidation, extension, or contraction of the municipality or municipalities be or be not reasonable."

It is first contended by appellant that § 2921 is unconstitutional, in that it submits to the decision and discretion of the executive department of the state questions which properly belong to the legislative, a co-ordinate branch of government. Without elaborating our views in this regard, or attempting to reply in detail to the ingenious and plausible arguments made, we simply announce as our conclusion that the law is not violative of any of the provisions or of the true intent of the constitution of the state. Sec. 88 of the Constitution of 1890 directs that the legislature "shall pass general laws, . . . under which cities and towns may be chartered and their charters amended, and all such laws shall be subject to repeal or

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amendment." In considering a kindred question we have recently decided that sec. 88 of the constitution was a command to the legislature to devise some general plan of easy operation under which municipalities might be chartered, or their charters amended so as to render resort to the law-making power in each instance unnecessary. *Yazoo City* v. *Lightcap,* 82 Miss., 148 (33 South., 949); *Adams* v. *Kuykendall,* 83 Miss., 571 (35 South., 830). We think § 2921 a valid step taken by the legislature in obedience to the mandate placed upon it by the section cited. It is not an unauthorized blending of the duties of the executive and legislative departments of government. The law in question does not require the governor to do aught more than decide the question of fact as to whether or no the petition presented to him is sufficient and sufficiently signed, and if it has been posted or published as required therein. These questions being determined affirmatively, the governor shall, not may, issue his proclamation declaring such village incorporated, and "defining its limits and boundaries." We think the argument of appellant that the governor is vested with the discretionary exercise of legislative power in defining the limits of the proposed municipality is based upon a misinterpretation of the statute. The true construction, as we gather from the context of the section under review, is this: The governor defines the limits of the municipality in his proclamation of incorporation by simply reciting those territorial boundaries which are required to be set out in the petition for a charter. Should he attempt to define the limits in any other manner, or to change the boundaries stated in the petition, his action would always be open to the doubt of whether the electors signing the petition on which he acted comprised the requisite proportion necessary under the terms of the law. And this doubt and uncertainty would exist whether he undertook to extend or contract the territorial boundaries embodied in the petition presented to

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him. The plan of the legislature, as disclosed by this section, is, to our minds, perfectly plain, simple, and easily followed.

The appellant further contends that the court erred in dismissing the tender of issue which it presented when the case was reached for trial. The provision of law governing this precise question is found in § 2913, before cited. The first clause thereof is as follows: "The appeal from the ordinance shall be to the circuit court and shall be tried on an issue to be made up; and the question shall be whether the proposed extension or contraction of the corporate limits be or be not reasonable." The city of Jackson insists that the language of the statute limiting the matters to be submitted to the jury to the sole inquiry of whether the proposed ordinance of extension "be or be not reasonable" restricts the consideration also to the time at which the ordinance was first enacted, and that the question of reasonableness of the action of the municipal board in adopting the proposed ordinance is to be considered in the light of the circumstances which confronted the board at the time the ordinance was adopted. Arguing from this, it is said further that, as the ordinance at the date of its adoption enlarged the boundaries of the city of Jackson only "by adding thereto adjacent unincorporated territory," no subsequent change of condition as to any of the territory so included could shed light upon the question of whether the action of the board was or was not reasonable. The reply to this argument, as made by appellees, is that, inasmuch as a portion of the territory embraced by the ordinance was incorporated prior to the submission of the cause to a jury for decision, there was no longer any controverted question to be determined, for the reason that a portion of the territory had already, under the provisions of law, been placed beyond the scope of the ordinance adopted; and therefore the ordinance must necessarily fail because it included territory which was "adjacent," but which was no longer "unincorporated." It will be noted that, while an ordinance enlarging the boundaries of a city does not

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become operative until publication is made and thirty days after its adoption have elapsed, an unincorporated village can procure a charter by posting or publishing legal notices for only three weeks. The conflict between the plans devised by the statutes being considered is apparent, and while it is impossible to reconcile them in all of their terms and provisions, we must still endeavor to so harmonize them as to effectuate as far as practicable the design of the legislature. While this design is presented dimly and uncertainly by the vague and indefinite terms of the two acts, and while the provisions are in some respects irreconcilable, after mature consideration we are of the opinion that it was the legislative intent to inaugurate a scheme by which the charter should follow the first initiatory step taken in pursuance of either act; otherwise a city could never extend its corporate limits, for the obvious reason that an ordinance of extension only becomes operative thirty days after its passage, while the necessary steps to procure incorporation of an unincorporated village can all be taken in three weeks. Hence, though a city might at any time adopt an ordinance extending its corporate limits, and though such extension might not only be reasonable, but an imperative necessity for the protection and preservation of the public health and general welfare, still the electors of adjacent unincorporated territory, by action subsequently taken, could avoid the extension by the city, and procure a charter before the ordinance became operative. The result of this view would be that the inhabitants of a suburb lying immediately adjacent to a city who share the many conveniences and advantages of city life, including increased railroad facilities, incidental protection against fire, and the enhanced value of property brought about by the enterprise and progress of the municipal government, could yet refuse to share the burden of taxation which such benefits entail by not procuring a charter for themselves, and yet having the power of defeating any effort, no matter how timely or wise, on the part of the city, to extend its own

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limits. This is not the true view. It is no sufficient answer to say that the inhabitants of such suburb have the right to have such territory remain unincorporated, if they prefer. It is the fundamental principle of our form of government that the liberty of the individual must be subordinated to the public good, and cases can easily be imagined where the safety, welfare, and health of the entire city might be imperiled by the location at its very gates of an unincorporated community which would be beyond its police power, and could defy its quarantine and sanitary regulations. The legislature did not contemplate encouraging this condition of affairs, and yet it would be the logical result of a holding that by action subsequent to an ordinance of extension an unincorporated village could defeat the effort to include it within the limits of the city. No city would do the idle thing of adopting an ordinance with full knowledge that its becoming operative and effective was dependent entirely on the wishes of the very persons whose property was thereby subjected to taxation; especially when the parties concerned were already sharing to a large extent the advantages which rendered the imposition of taxes necessary.

Nor can we assent to the opposite view, contended for by appellant, that the charter of incorporation of the village must actually have been issued prior to the adoption by the city of the ordinance of extension in order to prevent the application of the ordinance. This construction would render it impossible, except in rare and improbable cases, for unincorporated territory lying adjacent to a city to procure a charter except by the acquiescence of the municipal authorities of the city. If this view be sound, no matter when or under what circumstances the electors residing in unincorporated territory so situate should decide to seek incorporation, though they might faithfully comply with every requirement of the law, at any moment before the governor shall by proclamation declare such corporation to be an accomplished and completed act the city authorities may adopt an ordinance which will defeat the at-

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tempted incorporation and render their efforts unavailing. This construction of the statute is likewise too narrow and restricted, and tends to defeat the object of the legislation.

It is our conclusion that in determining whether an ordinance extending the limits of a municipality be or be not reasonable, the action of the board of mayor and aldermen must be considered solely in the light of the conditions which confronted it at the time the ordinance was adopted, and the reasonableness or validity of the ordinance would in no wise be affected by any action which might be taken by others subsequent to its passage. So in the instant case the action of the board of mayor and aldermen of the city of Jackson must be judged from the point of view which they occupied at the time the ordinance extending the limits was adopted, and when the cause is submitted to a jury the testimony as to the reasonableness of the ordinance must be confined to the circumstances existing at the time of its enactment. If, therefore, on the 23d of July, 1903, when the ordinance was adopted, it did in fact only embrace "adjacent unincorporated territory" within legal contemplation, the fact that any part of the territory so embraced subsequently procured a charter of incorporation, though in a strictly legal manner, would in no wise affect or bear upon the question of the reasonableness of the proposed extension. It appears from this record, and from the argument of counsel, that the court below held that the mere fact that at the date of the hearing in the circuit court a portion of the territory which was sought to be added to the city of Jackson had become incorporated was of itself sufficient to render the ordinance unreasonable and inoperative. This is not the correct view, and the court erred in dismissing the tender of issue presented by the city and peremptorily rendering judgment against the city. Upon another trial hereof the question to be submitted to the jury, as above indicated, is whether the proposed ordinance extending the limits of the city of Jackson was or was not reasonable at the date of its

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adoption. As bearing on this it is, of course, a question of vital and decisive importance whether or not at that date the citizens resident in the territory subsequently incorporated as the village of Duttoville had taken any legal initiatory step necessary to the incorporation which they subsequently obtained. If, as a matter of fact, it should appear that prior to the passage of the ordinance by the board of mayor and aldermen of the city of Jackson the inhabitants of Duttoville had already taken the initiatory step required by law by preparing a properly signed petition and in posting notices in the manner and places prescribed by law, then the subsequent action of the board of mayor and aldermen could not deprive them of the rights which they had thus acquired under the terms of the law. If, on the contrary, it should appear that this action on the part of the citizens of Duttoville in posting the notices was subsequent to the adoption of the ordinance by the city of Jackson, then they gain nothing by such action, and their subsequent incorporation was ineffective, provided the jury should decide, without regard to this, that the ordinance was otherwise reasonable. The record as presented to us here is barren of any proof more substantial than bare inference on which the trial judge could have based a decision that at the time the ordinance was adopted any but unincorporated territory was included therein; nor can it be assumed that, because the law requires the notice to be posted for three consecutive weeks, this renders it at all certain that the notices were in fact posted, in conformity with the law, prior to the adoption of the ordinance by the city of Jackson. And assuming that this is an inference logically to be deduced from the statement of the dates, there is still no evidence or suggestion to sustain the assumption of the existence of the other necessary facts that the petition was sufficiently signed, and that the notices, if posted, were posted in the manner and in the number of places required by the law.

Wherefore the judgment of the circuit court is reversed, and the case is remanded for a new trial.

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Brief for appellant.

STATE OF MISSISSIPPI v. JOHN T. BOOKER.

CRIMINAL LAW. *Attempt. Subornation of perjury. Code* 1892, §1246. *Indictment. Materiality.*

An indictment for an attempt to suborn a witness to commit perjury, under Code 1892, § 1246, is demurrable if it fail to show the materiality of the testimony corruptly sought.

FROM the circuit court of Tippah county.

HON. J. B. BOOTHE, Judge.

Booker, the appellee, was indicted for an attempt to suborn a witness to commit perjury. Leaving off mere formalities, the indictment was as follows:

"John T. Booker, late of the county aforesaid, on the 30th day of June, 1903, in said county, unlawfully, willfully, feloniously, and corruptly, for a valuable consideration, to wit, money, did attempt to procure Albert Fryar to commit willful and corrupt perjury as a witness in the bastardy case of *Willie Cox* v. *John Wicker,* which was to be tried after that time before S. W. Pegram, a justice of the peace of said county, before whom said cause was then pending, of which cause he had jurisdiction, and the said Albert Fryar having been summoned as a witness, and concerning which case the said Albert Fryar might by law be examined as a witness. The said John T. Booker did then and there offer to pay said Albert Fryar money if he would swear in said case that he (Fryar himself) had had sexual intercourse with her, the said Willie Cox, which testimony, if delivered by said Albert Fryar in said trial, would have been false."

A demurrer was sustained to the indictment and the state appealed to the supreme court.

J. N. Flowers, assistant attorney-general, for appellant.

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Statement of the case.

Leroy Kennedy, for appellee.

The indictment is based on Code 1892, § 1246. There is no allegation of materiality and perjury cannot be predicated of immaterial matter. *Jennings* v. *State*, 7 So. Rep., 462.

Whether Fryar ever, at any time, had sexual intercourse with the woman named in the indictment was immaterial. *Anonymous*, 37 Miss., 54.

CALHOON, J., delivered the opinion of the court.

The indictment in this case is bad in that it does not charge that the words of which an attempt at subornation of perjury is predicated were material to any issue, nor cure the omission by stating facts showing clearly that they were material. *Jennings* v. *State* (Miss.), 7 South., 462; *State* v. *Silverberg*, 78 Miss., 858; 29 South., 761. The demurrer to it was properly sustained.

Affirmed.

RICHARD N. SHEFFIELD *v.* JULIETTE FRIEDBERG ET AL.

CHANCERY PRACTICE. *Process. Injunction writ. Service. Pro confesso. Code* 1892, §§ 549, 3414, 3418.

The service on a defendant of an injunction writ, granted on a bill in equity seeking to restrain defendant from committing trespasses, and demanding damages and the statutory penalty for cutting trees, the same not being a summons and not containing the requisites of one (Code 1892, §§ 3414, 3418), does not authorize the granting of a pro confesso to the bill (Code 1892, § 549), although the writ, naming no return-day, commanded the defendant to appear and answer the bill.

FROM the chancery court of, second district, Bolivar county.

HON. CARY C. MOODY, Chancellor.

Mrs. Friedberg and others, appellees, were complainants in the court below; Sheffield, appellant, was defendant there. From a final decree, predicated of a *pro confesso*, the defendant appealed to the supreme court.

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Statement of the case.

The bill alleged that complainant was the real owner of certain lands described in the bill, and that Sheffield had no right or claim whatever to the land, but that, without the consent of complainant, he willfully, knowingly, and without authority from complainant, entered upon the land, and cut down and destroyed and took away a number of white oak trees, and split them into staves; that the staves were then piled on the land, and Sheffield refused to allow complainant to remove them; that complainant had a right to remove the staves and sell them, and that Sheffield was threatening to forcibly prevent the removal of the staves from the land. The bill states that there were 7,760 staves, and that they were worth $45 per thousand, and that Sheffield was liable to complainant for the statutory penalty of $15 per tree. The bill prayed for the issuance of a writ of injunction restraining Sheffield from any further interference with complainant's right, and specially enjoining him from interfering with complainant's right to remove the staves from the land. Upon this bill the writ of injunction was granted by a circuit judge. The writ of injunction contained the following clause: "And the sheriff of said county is hereby directed to serve notice of this injunction upon the said R. N. Sheffield in the manner required by law, and to make return thereof to the clerk of the chancery court at Cleveland, Miss., and to summon the said R. N. Sheffield to appear before said chancery court and answer the complaint filed against him." Upon this writ the sheriff made the following return: "Executed personally by handing R. N. Sheffield a true copy of the within writ this 25th day of May, 1903." At the June term, 1903, of the chancery court of Bolivar county, a decree *pro confesso* was entered against defendant. On the 21st of December, 1903, a notice to take depositions was served on the defendant, and the deposition of one Denton was taken as to the number of trees cut and the number and value of the staves. On January 5, 1904, a final decree was rendered adjudging the property of the staves to be in complainant, and

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Brief for appellant.

decreeing against Sheffield the statutory penalty of $15 per tree, amounting to $1,290, and the injunction was made perpetual.

J. W. Cutrer, for appellant.

Sheffield, defendant below, had no such sufficient legal notice as would entitle appellees, complainants below, to a decree by default against him.

This court has affirmed and reaffirmed, again and again, that defendants must be properly summoned. *Thomas* v. *State,* 62 Miss., 184; *Semmes* v. *Patterson,* 65 Miss., 6; *French* v. *State,* 53 Miss., 651; *Woodliffe* v. *Connor,* 45 Miss., 552; *Heirmann* v. *Stricklin,* 60 Miss., 234; *Betts* v. *Baxter,* 58 Miss., 329; *Acme, etc., Co.* v. *Vandergrift,* 70 Miss., 91; *Faison* v. *Wolfe,* 63 Miss., 24; *Hargus* v. *Bowen,* 46 Miss., 72.

How was the appellant here, defendant below, to know when to appear? If this were an appeal from the circuit court, it might be argued that the return-day is fixed by law, but in chancery, under Code 1892, § 3418, the plaintiff has an alternative: He can have the process made returnable on "a rule-day in vacation, or on the first day of the term of court." Process should be complete on its face; otherwise the opportunity for error is manifest.

In the present case the appellant, a lumberman who had spent many of the years of his life in the woods, was ignorant and unaccustomed to the law and its requirements. He was handed the copy of the writ of injunction, which was "Greek" to him, and informed by the officer serving it that he was enjoined from removing certain staves from certain land. This command he religiously obeyed; then he went quietly on with his work, awaiting the next move of the appellee, complainant below. To his amazement, he is shortly afterwards informed that a decree *pro confesso* has been rendered against him, and that he has not only lost the value of his staves, but that a statutory penalty of $15 per tree for every tree he has felled

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Brief for appellant.

has been assessed against him, and this without regard as to whether he is in the right or in the wrong.

The summons did not inform him when he was to appear and defend his rights, and he naturally, therefore, directed his attention to the injunction, which was real, and not to the summons, which was hardly even apparent.

Sec. 549, Code 1892, contains a very clear statement of the time when a defendant is required to answer: "On or before the first day of the term, if the process be returnable to a regular term of the court; and if the process require the appearance of the defendant on a rule-day in vacation, the defendant shall plead, etc., on or before the rule-day next succeeding that to which the process is returnable."

Where no return-day is stated in the summons, another difficulty arises. There is no certain time set for the hearing, unless complainant and defendant agree on one; and, suppose the complainant agrees that where the return-day is omitted in the summons the process shall be considered returnable to the next term of court, has the complainant the right to take a decree *pro confesso* at an intervening rule-day and trust to luck that, in a dispute over the matter, his word will outweigh the defendant's?

This lack of a return-day in the summons begets another difficulty: no proof can be taken until after the time for answering shall have elapsed. In the present case, where no return-day is stated, when will the time for answering have elapsed? If the decree in this case be approved, then this court will be compelled to say in effect that the complainant had the option of stating when the return-day was, without consulting any one; and that at any time before his first appearance in court he had the privilege of changing his mind, and changing it, furthermore, just so often as he pleased.

The proper wording and service of process is a serious matter. The manner in which it shall be done is specified by statute, and this court has always insisted that such statutes

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Brief for appellee.

be strictly followed. "If a writ is made returnable on no day whatever and judgment is entered by default, such judgment is irregular for want of notice." 22 Am. & Eng. Ency. Law, 191; *Bobb* v. *Graham,* 4 Mo., 222.

Moore & Clark, for appellee.

The defendant, Sheffield, was summoned to answer the bill. The writ of injunction issued contained the following clause—to wit:

"And the sheriff of the said county is hereby directed to serve notice of this injunction upon the said R. N. Sheffield in the manner required by law and to make return thereof to the clerk of the chancery court of the said county at Cleveland, Miss., and to summon the said R. N. Sheffield to appear before said chancery court and answer the complaint filed against him." Upon this writ is endorsed the following service—to wit:

"Executed personally by handing to R. N. Sheffield a true copy of the within writ this 25th day of May, 1903. Signed W. A. Shelby, Sheriff, by W. J. Wooten, D. S."

At the June term, 1903, of the chancery court a decree *pro confesso* was entered against the defendant. Afterwards, on the 5th day of January, 1904, final decree was rendered, as shown by the record herein, in favor of the appellees, adjudging the property of the staves to Friedberg, and decreeing against the said Sheffield that he be required to pay to Friedberg, the said appellee, $15 per tree, amounting to $1,290, and ordering execution for said sum, and the injunction was also made perpetual.

Process was duly issued upon the original bill and personal service had on the defendant. No separate summons was issued, but the writ of injunction itself contained a clause commanding the sheriff to summon the defendant to answer the bill, and this was duly executed by personal service on the defendant. Code 1902, § 3439.

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Opinion of the court.

TRULY, J., delivered the opinion of the court.

The decree *pro confesso* was improperly taken. Sec. 916, Code 1892, provides that when an injunction is issued the fiat of the judge or chancellor granting the same "shall authorize the issuance of the process or writ returnable to the proper court or before the proper officer." In the instant case the fiat of the circuit judge granting the injunction did authorize the issuance of the necessary process, and ordered the same to be made returnable before the chancery court having jurisdiction; but none was issued, other than the writ of injunction, and that gave no notice of the claim for damages, or of the statutory penalty demanded by the bill of complaint, and named no date when the defendant was required to appear and plead, demur, or answer thereto, as required by Code 1892, § § 3414–3418. This was not a summons, in the meaning of the law, and imposed no duty upon the defendant. *Joiner* v. *Bank*, 71 Miss., 382; 14 South., 464. The object of a summons is to inform the defendant what is required of him under the law, and at what time and before what court he shall appear to make his defense. The writ served upon appellant in this case did not impart this information. It might well be that the defendant, not desiring to contest the issuance of a writ of injunction, and not being advised that any demand for damages or for a personal decree was contained in the bill of complaint, would not care to make any defense to the pending action, but would be willing that the same should go against him by default. Sec. 549 of the code provides that, after process is returned executed, "if the defendant shall fail to plead, answer or demur at the time required," the complainant's bill may then "be taken as confessed against such defendant." But here there was no "time required" by the writ served upon defendant, commanding him to appear at any stated time, no return day was stated in the writ, and therefore no *pro confesso* could properly be taken.

It follows that, as the chancery court never obtained juris-

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Statement of the case.

diction of the person of appellant, all subsequent proceedings in the case were void. We expressly decline to consider or decide any of the other questions presented by this record.

The case is reversed, the decree pro confesso vacated and set aside, the injunction retained until final determination, and the cause remanded for a hearing upon the merits.

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BEE W. JONES v. STATE OF MISSISSIPPI.

1. CRIMINAL LAW. *Murder. Self defense. Instruction. Abandonment of intent to kill.*

In a murder case it is error to give an instruction for the state denying defendant the right of self-defense if he armed himself with a deadly weapon and provoked the difficulty with intent to kill deceased, there being testimony tending to show that defendant abandoned the intent to kill before slaying the deceased and that the killing was in self-defense.

2. SAME. *Satisfaction of jurors' minds and consciences. Reasonable doubt.*

An instruction authorizing the conviction of a defendant if the minds and consciences of the jury are fully satisfied of his guilt is erroneous; the jury should not convict unless satisfied of a defendant's guilt beyond every reasonable doubt arising from the evidence.

FROM the circuit court of Leflore county.

HON. A. McC. KIMBROUGH, Judge.

Jones, appellant, having been indicted, tried, and convicted of the murder of one Robert Riley and sentenced to the penitentiary for life, appealed to the supreme court.

On the night of January 7, 1904, at a meeting of the colored Knights of Pythias, appellant shot and killed Riley. Before the meeting was called to order, some question came up

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Brief for appellant.

as to the correctness of the books of the organization, of which Jones had control, and Riley said: "Open up the lodge, and let Bee W. alone." Whereupon angry words passed between Jones and Riley, and Jones advanced toward Riley with his hands in his pistol pocket, making insulting remarks. The chancellor commander of the lodge went to Jones, caught him by the coat, and ordered him to take his seat. Thereafter Riley attempted to get a stick, and, failing in that, got a hatchet and advanced upon Jones, who moved away, drawing his pistol, and backed fifteen or twenty feet from where the trouble first commenced, followed by Riley, when Jones shot Riley, killing him. The third instruction given for the state, referred to in the opinion of the court, is as follows: "No. 3—The court instructs the jury that if the minds and consciences of the jury are fully satisfied by all the evidence in the case that the defendant provoked the difficulty with the deceased, armed at the time with a deadly weapon, provided for the purpose of killing or doing deceased some great bodily harm, and that he shot and killed the deceased in the difficulty so provoked, then the court instructs the jury that the defendant is guilty, even though the jury may believe that the defendant, at the time he killed the deceased, killed him in self-defense."

S. R. Coleman, for appellant.

The long line of decisions condemning the omission of "belief beyond reasonable doubt" has been violated, and the court is referred to Helm's case as authority for the language used. But the graver and greater error in the third instruction is in leaving out entirely and taking from the consideration of the jury whether or not Jones had abandoned the difficulty, even if he provoked it, and whether Riley was or was not the aggressor at the time of the shooting.

William Williams, attorney-general, and *McClurg, Gardner & Whittington,* for appellee.

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The testimony is undisputed that Jones made threats to kill Riley on Thursday morning; that he was the aggressor and provoker of the difficulty; that he entered it armed with a deadly weapon, intending to use it when he provoked or brought on the encounter; that he did originate the difficulty; that he did not at any time abandon the difficulty, and did use the weapon and kill Riley in the difficulty so provoked, pursuant to such intent, and provoked for the purpose of decoying his victim into demonstrations which would apparently justify the contemplated killing. There was no error by the court below in granting instruction No. 3 for the state. *Helm* v. *State,* 67 Miss., 562; *Aldridge* v. *State,* 59 Miss., 250.

Under the facts proved in this case this instruction is in complete harmony with the law as announced in *Cannon* v. *State,* 57 Miss., 147; *Allen* v. *State,* 66 Miss., 385; *Hunt* v. *State,* 72 Miss., 413; *Prine* v. *State,* 73 Miss., 838; *King* v. *State,* 74 Miss., 576; *Fore* v. *State,* 75 Miss., 727; *Long* v. *State,* 52 Miss., 36; *Smith* v. *State,* 75 Miss., 542.

TRULY, J., delivered the opinion of the court.

The third instruction for the state is fatally erroneous. It states that "if the minds and consciences of the jury are fully satisfied by the evidence in the case" of the existence of certain facts therein stated, the jury should convict, even though they should believe "that the defendant at the time he killed the deceased killed him in self-defense." "Full satisfaction" of the minds and consciences of the jury of the guilt of a defendant is no compliance with the rule which requires the jury to be convinced of guilt "beyond all reasonable doubt." *Williams* v. *State,* 73 Miss., 823; 19 South., 826; *Powers* v. *State,* 74 Miss., 777; 21 South., 657; *Lipscomb* v. *State,* 75 Miss., 576; 23 South., 210, 230. The instruction is further inaccurate in that it deprives the defendant of the right of self-defense, even though, after provoking the difficulty, he may have, in good faith, withdrawn therefrom. It is well

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settled that one may wrongfully provoke a difficulty, and yet if afterwards, at any moment during its progress, he in good faith abandons the conflict, and is subsequently murderously assaulted by the deceased, and is forced to slay in self-defense, he is not estopped from pleading such self-defense in justification of his acts. *Smith* v. *State,* 75 Miss., 553; 23 South., 260; *Patterson* v. *State,* 75 Miss., 675; 23 South., 647. We approve the language employed in *Lofton* v. *State,* 79 Miss., 734; 31 South., 425, where, speaking of an instruction similar to the one here under review, the court said: "This form of charge, declaring a defendant estopped to plead self-defense, is an exceedingly unwise one to be given. We have repeatedly condemned it. . . . It can never be proper, save in a few very rare cases where the case is such, on its facts, that a charge can be given embracing all the elements—not part of them, nor nearly all of them—essential to the estoppel. The old paths are the safe paths."

Reversed and remanded.

THOMAS R. FOSTER *v.* GEORGE SCHAFFER, ADMINISTRATOR.

ESTATES OF DECEDENTS. *Probation of Claims. Code* 1892, § 1932.

Under Code 1892, § 1932, regulating the subject, a claim for professional services rendered the decedent, not based upon an itemized account, is sufficiently stated for probation against his estate if it be in writing, and specify a definite sum as due from decedent to claimant "for legal advice and service rendered" to decedent.

FROM the chancery court of Warren county.

HON. WILLIAM P. S. VENTRESS, Chancellor.

Foster, appellant, propounded a claim for probate against the estate of Frank A. Schmidt, deceased, of which estate,

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Brief for appellant.

Schaffer, appellee, was administrator. The claim was in writing and in these words:

"VICKSBURG, Nov. 3, 1902.

"Estate of Frank A. Schmidt.

"To T. R. Foster, Attorney.

"For legal advice and services rendered Frank Schmidt, $500.00."

To this written statement Foster made the affidavit required by statute, Code 1892, § 1932.

The administrator contested this claim, and by agreement it was submitted to auditors. The auditors' report sets forth that the claim was not properly and legally registered, probated, and allowed, because it was not itemized in conformity to the above section, Code 1892. They further reported that under sec. 542 of said code, authorizing amendments generally in the chancery court, it should be amended, and it was allowed by them, when amended, for the sum of $225. Exceptions were filed by the administrator to the auditors' report to the effect that they had erred in finding that the account could be amended by itemizing it. These exceptions were sustained by the court, and a decree rendered disallowing the claim, and Foster appealed to the supreme court.

Smith, Hirsh & Landau, for appellant.

The case of *Cheairs* v. *Cheairs,* 81 Miss., 662, does not decide the point in controversy. In that case there was a fatal defect in the affidavit, and there was no motion made to amend, the creditor who propounded the claim resting solely upon the affidavit and made no motion to amend the affidavit.

Sec. 1932 of the code uses this language: "If there be no written evidence thereof, an itemized account or a statement of the claim in writing signed by the creditor." We respectfully submit, and the court, we think, will take judicial knowledge of this, that lawyers do not in their practice keep itemized

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accounts, and do not enter from time to time on their books charges for each consultation, and about what subject the consultation was had with the client, and we submit that the words "itemized account" cannot fairly be applied to the claim of a lawyer against the estate of his deceased client, and that the claim as presented was good originally.

Brunini & Hirsh, for appellee.

The case of *Cheairs* v. *Cheairs,* 81 Miss., 662, is decisive of the point. Sec. 1932 of the code requires an itemized account, and Foster's claim was not itemized.

In the Cheairs case the court expressly asks itself this question, "Is sec. 1932 mandatory?" and it replies in the affirmative. We submit that if sec. 1932 is mandatory in whole, it must be as to any one of its constituent parts. If the affidavit be mandatory, then the itemized account must also be mandatory. If the one be "an indispensable jurisdictional prerequisite," then the other must also be. If this be true, then the registration, probation, and allowance of the account by the clerk which is not itemized is void.

TRULY, J., delivered the opinion of the court.

The probated claim of appellant should have been allowed for the amount found by the auditors to be due thereon. Sec. 1932, Code 1892, provides that "any person desiring to probate his claim shall present to the clerk the written evidence thereof, if any, or, if the claim shall be a judgment or decree, a duly certified copy thereof, or, if there be no written evidence thereof, an itemized account, or a statement of the claim in writing signed by the creditor," and make affidavit, to be attached thereto, in the form therein set out. No point is made as to the form of the affidavit which was made by appellant and attached to his claim, hence the case of *Cheairs' Ex'rs* v. *Cheairs' Adm'rs,* 81 Miss., 662; 33 South, 414, which deals with that question solely, is not applicable. Appellant

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did present, as required by law, "a statement of the claim in writing," and this was a substantial compliance with the provisions of the section quoted. The claim was not based upon an itemized account, but was for a certain sum for professional services rendered to the decedent, and a written statement thereof was duly presented, sworn to, and registered. This was a notification to the administrator and all concerned that this claim was made against the estate, and furnished an opportunity to have the claim contested under sec. 1934 of the code, whereupon it devolved upon the claimant to establish his claim by competent evidence. *Allen* v. *Hillman*, 69 Miss., 230; 13 South., 871; *North* v. *Lowe*, 63 Miss., 31. Having sustained his claim by proper and satisfactory proof, he was entitled to have it allowed. The construction which the chancellor placed upon sec. 1932 was too narrow, and absolutely nullified that clause which permits claims to be probated on filing a "statement of the claim in writing," and yet a large class of debts falls within this category.

Reversed and remanded.

GEORGE W. WISE *v.* KERR THREAD.

1. VENUE. *Justice of the Peace. Suit on judgment. Code* 1892, § 2395.

A suit upon a judgment rendered by a justice of the peace is properly brought, under Code 1892, § 2395, regulating the venue of actions in justices' courts, before a justice of the peace of the district of defendant's residence, although the judgment sued upon was rendered by another justice of the peace of a different district.

2. JUSTICES OF THE PEACE. *Judgments. Enrollment. Code* 1892, § 2413.

A judgment of a justice of the peace may be enrolled in any county upon compliance with Code 1892, § 2413, providing for such enrollment on filing an abstract of the judgment with the clerk of the circuit court.

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Statement of the case.

3. SAME. *Suit upon judgment. Loss of record. Evidence. Code* 1892, § 1792. *Laws* 1896, *p.* 108.

In an action upon a judgment rendered by a justice of the peace a certified copy of the judgment roll is admissible in evidence, under Code 1892, § 1792, as amended, Laws 1896, p. 108, making such certificate competent evidence of enrollment, the records of the justice of the peace who rendered the judgment having been destroyed.

FROM the circuit court of, second district, Coahoma county.

HON. SAMUEL C. COOK, Judge.

Thread, the appellee, was plaintiff in the court below; Wise, the appellant, was defendant there.

Thread brought suit against Wise before the mayor of Jonestown, in Coahoma county, and obtained a judgment. This judgment was never satisfied. Wise afterwards removed to justice district No. 3 of said county. Coahoma county is divided into two circuit court districts, and Wise lived in the second district. The judgment was never enrolled in the second circuit court district, but was enrolled in the first circuit court district. Appellees brought this suit against Wise, based on the judgment rendered by the mayor of Jonestown in the justice of the peace court in justice district No. 3, where Wise then lived. There was a judgment for plaintiff, and the defendant appealed to the circuit court. The defendant moved to dismiss the cause because, as was claimed, "the court had no jurisdiction to proceed with the cause, the judgment sought to be revived having been rendered by another court." This motion was overruled. In the trial on the merits, the certified copy of the judgment roll from the first district of Coahoma county was introduced in evidence over defendant's objection. It was shown that the justice of the peace docket in which the judgment against defendant was entered had been destroyed by fire, and the only evidence that there had ever been a judgment against appellant was the certified copy of the judgment roll, together with the testimony of the attorney who wrote the judgment in 1895. This wit-

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Brief for appellant.

ness had no independent recollection of the date of the rendition of the judgment, but was allowed, over defendant's objection, to refresh his memory from the certified copy of the judgment roll for the purpose of fixing the date, terms, and amount of the judgment sought to be revived. The cause was tried before the judge without a jury. From a judgment for plaintiff defendant appealed to the supreme court.

J. W. Cutrer, for appellant.

There are two methods of saving a judgment from the bar of the statute of limitations. One method is by an action of debt on the judgment, which is as much a new and independent suit as is an action to recover on a promissory note. The other method, the one adopted in this case, is by a proceeding of *scire facias.* Either course was open to appellee. The statement filed with the justice sets out that the proceeding is "to revive or renew" a judgment. It is exactly what should be set up in a petition for the writ of *scire facias.* Appellee could not have worded a petition for the writ more appropriately, for the very purpose of the writ is to revive and give additional life to a dying judgment. When appellant came into court in obedience to its process, he was at once confronted with the fact that the proceeding was one for a revivor. The application to revive should have been made before the present mayor of Jonestown, because of the fact that a proceeding by *scire facias* to revive a judgment is not an original proceeding, but is nothing more than a continuation of the former suit. 18 Am. & Eng. Ency. Pl. & Pr., p. 1060, note 1, and cases there cited; Bouvier's Law Dictionary; 3 Blackstone, 416; *McLeod* v. *Harper,* 43 Miss., 42.

It necessarily follows therefore that the only court of jurisdiction in such a proceeding is the court which rendered the original judgment; and the *scire facias* must issue therefrom, and not from some other court. *Conner* v. *Neff,* 27 N. E. Rep., 645; *Masterson* v. *Cundiff,* 58 Tex., 472; *Schmidtke*

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v. *Miller,* 71 Tex., 103; *Wonderly* v. *Lafayette Co.,* 77 Fed. Rep., 665; 18 Am. & Eng. Ency. Pl. & Pr., p 1064, note 1, citing *Funderbunk* v. *Smith,* 74 Ga., 515; *Barron* v. *Pagles,* 6 Ala., 422; *Knapp* v. *Knapp,* 134 Mass., 353; *Tindall* v. *Carson,* 16 N. J. L., 94, and others.

Fitzgerald, Maynard & Fitzgerald, for appellee.

No rule of law is better settled than the one that an action of debt is maintainable on a judgment of a court of record. Under the common law when no execution has been issued on a judgment for a year and a day, the judgment creditor may resort to *"scire facias,"* or an ordinary suit within twenty years. The remedy is cumulative. 18 Ala., 519; 4 Conn., 403; *Fiels* v. *Sims,* 11 South. Rep., 763; 92 Am. Dec., 410; 46 Ill., 374; 10 Iowa, 377-591. This action of debt upon a domestic judgment is also a statutory remedy in our state. See § § 2743, 2750, Code 1892. It is the only remedy to keep a judgment perpetually alive; for a *"scire facias"* is not a new judgment, and no *scire facias* can be issued to revive a judgment upon a former order to revive, but must be issued upon the original judgment within seven years from the date thereof. It is only by this action of debt that our judgment obtained in 1895 could be again revived. A writ of *scire facias* is not an action, and was not the remedy meant by § § 2743, 2750, Code 1892. *Pollard* v. *Eckford,* 50 Miss., 631.

TRULY, J., delivered the opinion of the court.

This action is based on a domestic judgment, and, being in amount within the jurisdiction of a justice of the peace, was properly brought in the district where the defendant resided. §§ 2395, 2737, Code 1892. The position assumed by counsel for appellant, that, because this was a suit to renew a judgment, jurisdiction was vested exclusively in the court in which the judgment was originally rendered, is unsound.

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The certified copy of the judgment roll was properly admitted in evidence. Ch. 101, p. 108, Acts 1896. Judgments rendered by justices of the peace may be enrolled in any county in this state upon compliance with § 2413, Code 1892. The testimony amply supports the finding of the trial judge, that this suit was instituted within seven years next after the rendition of the judgment on which it is founded.

Affirmed.

ADONIS AYCOCK *v.* BUDWEIS HAMPTON.

BASTARD. *Custody of. Putative father.*

The mother of a bastard child being dead, the putative father, in the absence of any showing of his unfitness, is entitled, if able to take care of and support it, to the custody of the child, as against its maternal uncle.

FROM the circuit court of Alcorn county.

EUGENE O. SYKES, Judge.

Aycock, the appellant, was petitioner and plaintiff in the court below; Hampton, appellee, was defendant there. The suit was an *habeas corpus* proceeding, in which the plaintiff sought to obtain the custody of his bastard twelve-year-old daughter, Angeline Aycock, whose mother, one Celia Lust, was dead. The defendant was a brother of the child's deceased mother. The evidence showed that plaintiff was the father of the child; that it lived with its mother until she died, and it was then taken by Hampton; that relator was able to take care of and support the child, and that all the parties were colored people. From a judgment denying the prayer of the petition and dismissing the suit plaintiff appealed to the supreme court.

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Brief for appellee.

Lamb & McKenzie, for appellant.

Under the common law the mother was entitled to the care and custody of her bastard child, but at her death then the reputed father was entitled to its care and custody.

"The mother, as guardian by nurture, has the right to the custody and control of her bastard child, until it shall have attained an age when it can, in contemplation of the law, make an election between father and mother. If, on the other hand, the mother be dead, the father has the right to the custody and control of the child." 3 Am. & Eng. Ency. Law [2d ed.], p. 888.

"The putative father of an illegitimate child is entitled to the custody of the child, as against all persons but the mother; if the mother be dead and the father is a suitable person, it shall be taken from the maternal grandparents and delivered to him." Pote's Appeal, 51 Am. Rep., 540; *Commonwealth* v. *Anderson,* 1 Ash., 55; *Richards* v. *Hodges,* 2 Saund., 83.

"Though a bastard be not looked upon as a child for any civil purpose, the ties of nature are respected in regard to its maintenance. The putative father, though not legally related to it, is so far considered its natural guardian as to be entitled to the custody of it." *Moritz* v. *Garnhart,* 32 Am. Dec., 762; *The King* v. *Cornforth,* 2 Stra., 1162.

In the case of *Rex* v. *Cornfoot,* 1 Boot's Poor Laws, 465, it was held that a putative father has a natural right to the care and education of his illegitimate child.

Boone & Curlee, for appellee.

Appellant seeks to recover possession of the child on the ground that he is her putative father. The court below excluded the testimony and rendered judgment for the defendant, Budweis Hampton, upon the authority of the *Illinois, etc., R. R. Co.* v. *Johnson,* 77 Miss., 727, in which case this court held that under the common law bastards were children of nobody. Upon this authority the court decided that the appellant had

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no rights whatever, even though it should be admitted that he was the father, and therefore dismissed the writ.

There is nothing in the record to show that the child is to be benefited by being delivered to him; there is nothing in the record to show that it is for the best interest of the child that she should be delivered to the appellant; but the case stands solely upon the question as to whether or not appellant is to be recognized under our laws as having such legal status with reference to this child as to entitle him to its possession. All the authorities agree that an illegitimate child is *nullius filius,* and this law must govern in this case, as held in the Johnson case above, unless there are some peculiar circumstances where a change should be made, such as being in *loco parentis,* as some of the authorities hold. There are no exceptions in the circumstances shown by this record. This man never having been in *loco parentis* or any other position with reference to this child prior to the bringing of this writ or up to this time, stands upon his naked right as putative father of the child.

Appellant's counsel evidently relies upon the abstract statement of the Cyclopædia of Law & Procedure, and the Am. & Eng. Ency. Law, to the effect that the putative father of the bastard is entitled to its custody against all but the mother, but an examination of the cases referred to by the authors to sustain their text does not sustain them in the broad assertions made by them. In this case counsel for appellant relies upon, as we are informed, *Pote's Appeal,* 106 Pa. St., 574. By examination of this case it will be seen that Pote's Appeal is based upon the case of *Moritz* v. *Garnhart,* 32 Am. Dec., 762, and upon examination of that case it will be seen that it is no authority for the conclusion reached in Pote's Appeal. Both of these cases are Pennsylvania cases, and whatever may be the opinion of the Pennsylvania court, as each court has a right to decide for itself what the common law is, and in the Johnson case, *supra,* this court has distinctly held that a bastard has no father, and in that same case holds that no state has gone

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farther than our own in the line of strict construction, changing the common law so as to intend nothing not expressly mentioned changing that law. The situation of the bastard under the laws of Mississippi is in the exact condition set forth by the court in the matter of Doyle, Clark Ch. (N. Y., 154). The court, in discussing the relations between father and illegitimate child, said: "The first principle that meets me is that an illegitimate child has, in contemplation of law, no father. Such child is *nullius filius*, and there is, therefore, no father who is bound to support it, or can rightfully claim its care and custody. There are, it is true, certain statute regulations by which the putative father may be compelled to indemnify the community against the expense of supporting a child who may otherwise become a public charge. But these statutes only make the person charged a father for a particular purpose—viz.: For the indemnity of society against the expense of the support of the child. The paternal and filial relations, in all their endearing and legal consequences, do not exist between such a father and such a child. The law looks coldly upon this relation, and takes no further care of it than to see that the community is not put to expense."

The case of *Moritz* v. *Garnhart, supra,* was an action based on relation of master and servant, and to sustain the action in that case it was shown that the child had lived for several years prior to its abduction in plaintiff's family, and from this service was implied; and the action in that case was sustained on implied service, and had no bearing on the issue presented in this case, and Pote's Appeal is based upon this last case as its authority.

WHITFIELD, C. J., delivered the opinion of the court.

The putative father was entitled to the custody of his illegitimate daughter, about eleven or twelve years old. There is nothing to show that he was an improper person to have the custody of his child. The learned court below seems to have

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proceeded on the idea that a putative father had no legal standing to maintain a writ of *habeas corpus.* The case of *Moritz* v. *Garnhart,* 32 Am. Dec., 763, states the true rule. The court say: "Though a bastard be not looked upon as a child for any civil purpose, the ties of nature are respected in regard to its maintenance. The putative father, though not legally related to it, is so far considered its natural guardian as to be entitled to the custody of it. In *The King* v. *Cornforth,* 2 Stra., 1162, the court granted an information for the abduction of a natural daughter from the protection of her putative father, thinking that a bastard is within the 4 and 5 Ph. & M., c. 8, which punishes the taking away of any maid or unmarried woman child from the possession of the father, mother, or person having the governance of it. Between the father and the mother, however, the latter seems to have the prior claim. *Ex parte* Knewe, 1 N. R., 148. In *Rex* v. *Cornfoot,* 1 Boot's Poor Laws, 465, it was held that a putative father has a natural right to the care and education of his illegitimate child; and in *Newland* v. *Osman,* Id. 466, he was allowed to take it from the parish and maintain it. It may be safely said, then, that the law recognizes the rights of putative paternity for purposes of nurture and education." Pote's Appeal, 51 Am. Rep., 540, also lays down the same doctrine, the court there saying: "That the putative father was a proper person to present this petition cannot, we think, be doubted. The putative father of an illegitimate child is entitled to the custody of the child as against all but the mother. If the mother be dead, and the father a suitable person, it shall be taken from the maternal grandparents and delivered to him." *Commonwealth* v. *Anderson,* 1 Ashm., 55. To the same effect are the English cases: *Richards* v. *Hodges,* 2 Saund., 83; *Burwell's Case,* Ventris, 48; *Sherman's Case,* Id. 210; and *Newland* v. *Osman,* referred to in Burne's Justice, 234. In *Moritz* v. *Garnhart,* 7 Watts, 302, 32 Am. Dec., 762, it was said that, although a bastard may not be looked upon as a child for any civil purpose,

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the ties of nature are respected in regard to its maintenance. The putative father, though not legally related to it, is so far considered its natural guardian as to be entitled to the custody of it. The learned Chief Justice Lewis, delivering the opinion of the court, after a full discussion of all the cases, concludes as follows: "It may be safely said, then, that the law recognizes the rights of putative paternity for purposes of nurture and education." We may allow large abatements, perhaps, from the estimate which the law makes in respect of the natural tenderness of parents for their own offspring in cases like this, but it is certain that the rule referred to is grounded in that consideration." The 3 Am. & Eng. Ency. Law [2d ed.], p. 888, states the rule as follows: "The mother, as guardian by nurture, has the right to the custody and control of her bastard child until it shall have attained an age when it can, in contemplation of the law, make an election between father and mother. If, on the other hand, the mother is dead, the father has the right to the custody and control of the child." The distinction between the right of a bastard to assert its rights for any civil purposes in the courts is a very different one from that which entitles it to have the ties of nature, as regards its maintenance and nurture, enforced.

Reversed and remanded.

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HARRIET N. CHAMBLISS v. ROBERT L. WOOD.

MOTION.

STATUTE OF LIMITATIONS. *Appeals. Code* 1892, § 2752.

Although an appeal bond be filed within two years after the rendition of the judgment sought to be appealed from, the appeal will be barred, under Code 1892, § 2752, limiting the time within which appeals to the supreme court shall be taken, if no citation be served on the appellee and no transcript of the record be filed in the supreme court before the expiration of such time.

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Opinion of the court.

FROM the circuit court of Winston county.

HON. GUION Q. HALL, Judge.

Mrs. Chambliss, the appellant, was plaintiff, and Wood, the appellee, was defendant in the court below. From a judgment in defendant's favor, sustaining a demurrer to the declaration and dismissing the suit, the plaintiff sought to appeal to the supreme court.

She executed an appeal bond within two years next after the rendition of the judgment, but failed to have a citation in error served on the appellee or to file a transcript of the record in the supreme court until after the expiration of said time.

The appellee appeared in the supreme court and made a motion to dismiss the appeal because barred by limitation.

Alexander & Alexander, for the motion.

There has been no summons on appellee. Even if *Houston* v. *Witherspoon,* 68 Miss., 188, be invoked, the answer is that the record was not filed within the two years allowed for an appeal. That period expired July, 1903. The transcript was filed September, 1903.

J. E. Rives, Contra.

It was held by this court that where a party against whom a judgment was rendered perfects an appeal, summons thereon being served, the appellee may move to docket and dismiss, if the transcript is not seasonably filed. But if he fails in this, a motion to dismiss for delay in bringing up the record will not prevail, if it is filed within the two years allowed for an appeal. *Houston* v. *Witherspoon,* 68 Miss., 188.

WHITFIELD, C. J., delivered the opinion of the court on the motion.

The case of *Houston* v. *Witherspoon,* 68 Miss., 188 (8 South., 515), is not authority here for two reasons: First—The decree in this case was rendered in July, 1901, and the appeal was

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consequently barred in July, 1903. The transcript was not filed in this court until September, 1903, more than two years after the rendition of the decree. Second—No citation was served on the appellee in this case, as was done in *Houston* v. *Witherspoon.* It was said in that case on this point: "In this case citation was served on the appellee, who did not avail of his right to apply to have the case docketed and dismissed, and will be held to have acquiesced in the delay." The appellee here cannot be held to have acquiesced in the delay, since no citation was served upon him.

The motion is sustained.

JOHN K. NUTT, ADMINISTRATOR, ET AL., *v.* ELIZABETH A. FORSYTHE ET AL.

JOHN K. NUTT, ADMINISTRATOR, ET AL., *v.* GERARD BRANDON, ADMINISTRATOR, ET AL.

JOHN K. NUTT, ADMINISTRATOR, ET AL., *v.* PATRICK HENRY, EXECUTOR, ET AL.

THREE CASES.

DESCENT AND DISTRIBUTION. *Deceased heirs. Legatees.*

The representatives of deceased heirs are entitled to share with the living heirs a sum of money appropriated by Congress to the administrator of their common ancestor in payment of a claim against the government.

FROM the chancery court of Adams county.

HON. WILLIAM P. S. VENTRESS, Chancellor.

In these cases the appellees—Mrs. Forsythe et al.; Brandon, administrator, et al.; and Henry, executor, et al., respectively—were petitioners. In each case the chancery court was asked to require the appellant, John K. Nutt, administrator, etc., to

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Brief for appellant.

recognize the petitioners as distributees of the estate of which he was administrator, and to enforce distribution. From a decree in each case in favor of the respective appellees, petitioners, and complainants, the administrator, Nutt, and others, appellants in each case, appealed to the supreme court. The appellants other than John K. Nutt, administrator, were the living heirs of Haller Nutt, deceased. The facts are stated in the opinion of the court.

Percy & Campbell, for appellant, Nutt, administrator, in each of the cases.

A claim having no foundation in law, but depending entirely upon the generosity of the government, cannot be assigned. It does not go to the administrator as assets. It does not descend to the heir. If allowed by the government and appropriation is made therefor, it is a mere gratuity or donation. *Emerson's Heirs* v. *Hall,* 13 Pet., 409; *Blagge* v. *Balch,* 162 U. S. R., 439; *Thomas W. Campbell, Assignee,* v. *U. S. Ct. Cls.* (decided November 20, 1893); *Heard* v. *Sturgis,* 146 Mass., 545; *Taft* v. *Marisly,* 120 N. Y., 474; *Brooks* v. *Ahrens,* 68 Md., 212; *Kingsbury* v. *Mattocks,* 81 Me., 310.

In *Comeygs* v. *Vasse,* 1 Pet., 196, the claim was on account of insurance premiums which had been paid on vessels that were illegally captured by the Spanish government, and the claim was held to be assignable; in *Phelps* v. *McDonald,* 99 U. S. R., 298, the claim was on account of cotton belonging to a British subject, which he had purchased under permits from the President of the United States and Secretary of the Treasury, and which was destroyed by the Federal army during the civil war, and the claim was held to be assignable; and in *Williams* v. *Heard,* 140 U. S. R., 529, the claim was for insurance premiums paid on vessels which had been destroyed by the Alabama and other Confederate cruisers sailing from British ports, and the claim was held to be assignable; but the claims in these three cases were governed by principles of in-

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ternational law, and are differentiated from the claim in controversy, as will be seen by careful reading of them.

In *Emerson's Heirs* v. *Hall, ubi supra,* the court in commenting upon *Comegys* v. *Vasse,* said, "By the law of nations Spain was bound to indemnify the owners of foreign vessels, which had been illegally captured and condemned under her authority;" and the cases of *Phelps* v. *McDonald,* and *Williams* v. *Heard, ubi supra,* are based upon *Comegys* v. *Vasse.* In *Milnor* v. *Metz,* 16 Pet., 221, the claim was for extra services rendered by the gauger at the port of Philadelphia, under the act of Congress of 1836, for which no fees were prescribed, and the claim was held to be assignable; but, as shown in that case, the services performed by the gauger were at the instance of the government, and were necessary to execute the act of 1836; and in *Erwin* v. *United States,* 97 U. S. R., 392, the claim was for cotton which had been captured by the Federal authorities during the civil war, and which had been sold and the proceeds paid into the treasury of the United States, and the claim was held to be assignable; but that claim arose under the Captured and Abandoned Property Act of 1863, which gave the right and prescribed the remedy to be reimbursed for such property.

These are the only cases that have come under our observation which seemed to justify appellees' contention that the claim in controversy was assignable; but, as stated, the claims in the first three of these cases were governed by principles of international law, and the claims in the last two of these cases were based on existing statutes, and all of them were legal claims.

A claim for property, which was enemy's property, in enemy's territory, and was taken by military authorities in the exercise of the lawful right of a belligerent, is not a claim possessing an attribute of property, but it is like a pension claim, personal, and dependent upon the individual loyalty of the individual sufferer and the clemency of Congress. Such

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Brief for appellees.

was the claim in controversy, it did not possess an attribute of property. Its consideration by the court of claims was on account of the personal status of Haller Nutt, the owner, as being loyal to the United States throughout the civil war; and when finally allowed by Congress, it was done as a mere gratuity, on account of his loyalty, and not as a property right.

Brown & Martin, for appellants, in each of the cases, Calvin R. Nutt, Julia W. Nutt, and Lillie Nutt Ward, living heirs of Haller Nutt, deceased.

Counsel made the same points as preceding counsel, and cite the following authorities:

Comegys v. *Vasse,* 1 Pet., 193; *Emerson* v. *Hall,* 13 Pet., 409; *Ib.,* 10 L. ed., 223; *Erwin* v. *United States,* 97 U. S., 392; *Ib.,* 24 L. ed., 1065; *Williams* v. *Heard,* 140 U. S., 529; *Ib.,* 35 L. ed., 550; *Blagge* v. *Balch,* 162 U. S., 439; *Ib.,* 40 L. ed., 1032; *Briggs* v. *Walker,* 171 U. S., 466; *Ib.,* 43 L. ed., 243; *Price* v. *Forrest,* 173 U. S., 410; *Ib.,* 43 L. ed., 749; *Campbell, Assignee,* v. *United States* (decided by the court of claims on November 20, 1893); *Phelps* v. *McDonald,* 99 U. S., 298; *McKay's Case,* 27 Ct. Cls. R., 442; 13 *Ib.,* 241; *Dockery's Case,* 26 Ct. Cls. R., 148; *Heard* v. *Sturgis,* 146 Mass., 545; *Taft* v. *Marisly,* 120 N. Y., 474; *Brooks* v. *Ahrens,* 68 Md., 212; *Kingsbury* v. *Mattocks,* 81 Me., 310; *Estate of Moore,* 26 Ct. Cls. R., 254; Supplement to Revised Statutes of United States, vol. 1 (2d ed.), p. 403; 16 Am. & Eng. Ency. Law (2d ed.), 1146-1147 and authorities cited in note 1, p. 1147; 2 Am. & Eng. Ency. Law, 87.

Reed & Brandon, for the appellees, Forsythe et al., and Brandon, administrator.

Counsel cite the following cases in support of the decree of the court below:

22 U. S. Statutes at Large, 88; 22 Statutes at Large, 485; 24 Statutes at Large, 505; Chap. 887, p. 207, Statutes at

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Brief for appellees.

Large 1901-02; Genesis, Chap. 48, p. 22; Genesis, Chap. 15; Plutarch in *vita* Solon; Roman 12 tables; Inst. 2, 22, 1; 4 Kent, 502 and note, 503, 504; 2 Black. Com., 490-492; Maine Ancient Law, 126; 1 Williams Ex., p. 6, note 3; *Erwin* v. *United States,* 97 U. S., 393; Jarman on Wills, p. 40; *Dowell* v. *Cadwell,* 4 Saw., 228 (1877); 131 Mass., 521; U. S. Statutes at Large 1901-02, Chap. 887, p. 218; 26 U. S. Statutes at Large, 862; *Blagge* v. *Balch,* 162 U. S., 439; *Emerson* v. *Hall,* 13 Pet., 409; 6 Statutes at Large, 464; 1 Bouvier's Law Dic., 830; 1 Kent Com., 92; Military Laws of the U. S. 1897, 779; Hague Convention War on Land, U. S. Statutes 1901-02, p. 48; *Dow v. Johnson,* 100 U. S., 158; 2 Kent, 338; *Mitchell* v. *Harmony,* 13 Howard, 115; *United States* v. *Klein,* 13 Wallace, 136; *United States* v. *Alexander,* 2 Wall., 404-423; *Comegys* v. *Vasse,* 1 Pet., 193; *Williams* v. *Heard,* 140 U. S., 529; *Comegys* v. *Vasse,* 1 Pet., 216; *Phelps* v. *McDonald,* 99 U. S., 298; *Buchanan* v. *Lawson,* 109 U. S., 659; 3 Sup. Ct. Rep., 479; *United States* v. *Weld,* 127 U. S., 51; 8 Sup. Ct. Rep., 1000; *Price* v. *Forrest,* 173 U. S., 410, 422; *Briggs* v. *Walker,* 171 U. S., 466; *Butler* v. *Gorely,* 146 U. S., 309; *Leffingwell's Appeal,* 62 Conn., 361 (25 Atlantic, 455); *In re* Banks Will, 87 Maryland, 442 (40 Atlantic Rep., 274); *Jernegan* v. *Osborn,* 155 Mass., 210, 29 N. E., 521; *Stanly* v. *Swally,* 140 U. S., 517; 147 U. S., 517; 163 U. S., 427; *Maitland* v. *Grissinger,* 1 Wood. (Pa.), 294; 8 B. Mon. (Ky.), 165; *Rogers* v. *Kennard,* 82 Tex., 58; *Merriweather* v. *Herran,* 2 Wash. Ter., 58; *Burch* v. *McDaniell,* 33 Tex., 705; *Goldsmith* v. *Herndon,* 54 Tex., 30; *Lyne* v. *Sanford,* 27 Am. St. Rep., 852; 44 S. W. Rep., 1002; *Lang* v. *Morey,* 40 Minn., 396; 12 Am. St. Rep., 748; *Pendleton* v. *Shaw,* 44 S. W. Rep., 527; *State* v. *Zance,* also 18 Tex., 101; 21 Tex., 404; 46 Tex., 345; 51 Tex., 97, and 20 Pickering, 67; 65 Vt., 84; 2 Woodward, 259; 40 Maine, 197; 78 Maine, 460; 79 Maine, 234; *United States* v. *Realty Co.,* 163 U. S., 427; *Barrow* v. *Milliken,* 74 Fed., 615; 41 U. S. Ap., 332; *United States* v.

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Opinion of the court.

Weld, 127 U. S., 51; *United States* v. *Borcherling,* 185 U. S., 223; *Vaugh* v. *Northrot,* 15 Pet., 1; *Walker* v. *United States,* 34 Ct. Cls. R., 345; *Van Waggener, Administrator,* v. *United States,* 31 Ct. Cls. R., 175; *Lynch, Administrator,* v. *United States,* 31 Ct. Cls. R., 62; *Labadie, Administrator,* v. *United States,* 32 Ct. Cls. R., 368; *Sample's Case,* 24 C. C. R., 422; *Durke's Case,* 28 C. C. R., 326; *Ingraham's Case,* 32 Ct. Cls. R., 147; *Stovall* v. *United States,* 26 Ct. Cls. R., 226; *Hefflebower* v. *United States,* 21 Ct. Cls. R., 228; *Heard* v. *Sturgess,* 146 Mass., 454; Littleton, Sec. 337; *Overton* v. *Sydall,* Popham, 120, 121; *Boyer* v. *Rivet,* 3 Bulstrode, 317, 321; *Bain* v. *Cooper,* 1 Dowling Pr. (N. S.), 11, 14; *Green* v. *Elkins,* 2 Atkin, 473, 476; *Duncan* v. *United States,* 18 Ct. Cls. R., 230; *Anderson* v. *United States,* 9 Wall., 56.

Henry & Scudder, for appellee, Henry, executor.

Counsel cite the following authorities in support of the decree of the court below:

Meade v. *United States,* 2 Ct. Cls. R., 224; *Comegys* v. *Vasse,* 1 Pet., 195; *Erwin* v. *United States,* 97 U. S., 392; *Milnor* v. *Metz,* 16 Pet., 221; *Briggs* v. *Walker,* 171 U. S., 466; *Grant* v. *Bodwell,* 78 Me., 460; *Pierce* v. *Stidworthy,* 79 Me., 234; 3 L. R. A., 462, note; *Green* v. *Ekins,* 2 Atk., 473, 476; *Williams* v. *Heard,* 140 U. S., 529; *Emerson* v. *Hall,* 13 Pet., 409; *Price* v. *Forrest,* 173 U. S., 140; *Blagge* v. *Balch,* 162 U. S., 439; 27 Am. & Eng. Ency. Law [1st ed.], 540; *United States* v. *Gillis,* 95 U. S., 407; *Goodman* v. *Niblack,* 102 U. S., 556.

CALHOON, J., delivered the opinion of the court.

Each of these cases is determinable on the same reasoning. In each the only question is whether or not the chancellor properly overruled appellant's demurrer to the separate bills filed by appellees. Each bill is to require the administrator d. b. n. c. t. a., the appellant, to pay complainants below, ap-

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pellees here, a distributive share under the will of Haller Nutt, deceased. The first (No. 11,143) is based on the will of Mrs. Caroline Marble, sole heir of Carrie Nutt Forsythe, a deceased intestate daughter of Haller Nutt, which will of Mrs. Marble gave to appellees Elizabeth H. and Mary A. Forsythe "all the property, real and personal, of which I shall be at the time of my decease possessed, or to which I may be in any way entitled, and wherever the same may be situated." The second (No. 11,144) is based on a bequest in the will of Mary Ella Nutt, a daughter of Haller Nutt, of "all that I die possessed of to my sisters, Julia W. Nutt and Lillie Nutt Ward, also all interest in the claim against the United States government," etc. The third (No. 11,145) is based on the will of Haller Nutt, Jr., a son of Haller Nutt, which will gives his brother, S. P. Nutt, appellee, one-half of his share "of that certain claim No. 1,851 styled '*Julia A. Nutt, Executrix of Haller Nutt, deceased,* v. *the United States,* in the Court of Claims,'" and the other half the will gives to Annie Coleman, appellee. All three of these cases are here from a decree overruling demurrers to the bills. There is but one question in all the cases which we think worthy of any serious consideration, and that will develop from those facts stated in the bills and the agreement of counsel as to what, in addition, may be considered in arriving at a conclusion.

Haller Nutt, the common ancestor of the parties, was a citizen and resident of Natchez, Miss., but had very large possessions in the state of Louisiana, and was, for these parts, and at the time of the origin of the claim which is the cause of all these controversies, a man of very great wealth. During the war between the states he was known to be unmistakably not only an opponent of secession and of the Southern Confederacy, but absolutely devoted to the Union and the cause of the Federal government. He was so devoted, and to such an extent, that he welcomed the invasion of the Union armies. This was well known to Gen. Grant and all of his subordinate

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officers. In the operations of that commander against Vicksburg, the properties of Mr. Nutt in Louisiana were occupied by the United States army, but put under safeguards. These safeguards were, because of his well-known loyalty, ordered by Gen. Grant, Gen. Sheridan, Gen. McPherson, and Gen. Gresham. According to Brig. Gen. McKee, who commanded the first of the Union forces to enter Natchez, Mr. Nutt "was the first man to step forward and welcome" them. By the reports of committees of the United States Senate appointed to investigate this very claim, propounded first in 1866, by Julia A. Nutt, widow of Haller Nutt, and then executrix of his will, it is shown that the Federal army was compelled, by necessity, to disregard the safeguards, and appropriate supplies of enormous value. It is shown that, if damage by destruction of property could be considered, such as houses, gins, 750 bales of cotton, etc., the loss was $1,000,000 or more. But, excluding these, and considering only quartermaster and commissary supplies, it is shown that the claim largely exceeded $100,000. In all, there have been four payments on this since it was first presented from 1866 to date—the three first to the estate of Haller Nutt, and distributed as assets; and the last, $89,999.89, recently paid to the administrator d. b. n. c. t. a. of that estate, and which is the subject of the present litigation. It is important to note the language of the act making the appropriation of this last-named sum. It appears in an omnibus appropriation bill to several hundred claimants, some to individuals named, some to "heirs," some to "next of kin," etc., and is in these words: "To James C. Williams, administrator of Haller Nutt, deceased, of Adams county, $89,999.89" —figures written. Williams died, and John K. Nutt is now the administrator, and the children of Haller and Julia A. Nutt, through the administrator, contend that because they happen to be now alive they should have the whole sum to the exclusion of the legatees of the three children who happened to die before this last payment was made. We do not think so.

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Syllabus.

The claim was in prosecution for thirty years, recognized as just by the great military leaders, by the quartermaster general, and great statesmen on congressional committees, and certain it is, in the line of the reasoning in *Williams* v. *Heard,* 140 U. S., 529, 11 Sup. Ct., 885; 35 L. ed., 550; and *Price* v. *Forrest,* 173 U. S., 427–429; 19 Sup. Ct., 434; 43 L. ed., 749, that the government was under the highest moral obligation to pay it, and this is recognized. If the matter were between individuals, the right of recovery would have been clear. This is not a case where the appropriation was to "heirs," as in *Emerson* v. *Hall,* 13 Pet., 409; 10 L. ed., 223, or to "next of kin," as in *Blagge* v. *Balch,* 162 U. S., 439; 16 Sup. Ct., 853; 40 L. ed., 1039; nor is it a case where no appropriation has yet been made, as in the case of *Campbell* v. *United States,* 28 Ct. Cls., 512. Here the appropriation has been made, and made specifically to the administrator with the will annexed, and must be intended to be designed as estate assets for distribution to creditors, and, when they are paid, to heirs living and representative of heirs dead, according to the laws of distribution.

Affirmed.

LEONIDAS F. DREYFUS *v.* WILLIAM A. GAGE ET AL.

1. LANDLORD AND TENANT. *Waiver of lien. Deed of trust. Advances to tenant.*

A landlord who waives his lien to the extent of a designated sum in order that the tenant may secure advances from another by executing a deed of trust on his crops to be grown on the leased premises, cannot escape the effect of the waiver because the deed of trust recited that the advances were to be used also in making a crop on other lands, and did not expressly require advances to the full extent of the waiver.

2. SAME. *Assignee of rent notes. Estoppel.*

An assignee of notes given by a tenant to his landlord for rent is estopped to assert the priority of his statutory lien against one

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Brief for appellant.

who makes advances to the tenant on the security of the landlord's waiver and the tenant's trust deed on the crops to be grown on the demised premises, when such assignee has concealed from him his ownership of the notes and induced him to believe that the landlord's waiver and the tenant's trust deed will operate to give him a first lien on the crops.

FROM the chancery court of Bolivar county.

HON. A. McC. KIMBROUGH, Chancellor.

Dreyfus, appellant, was complainant in the court below, and Gage and others, appellees, were defendants there. From a decree in defendants' favor the complainant appealed to the supreme court. The facts are stated in the opinion of the court. [For a decision of a former appeal in the same case, see *Dreyfus* v. *Gage*, 79 Miss., 403.]

J. S. Hicks, and *Charles Scott, Woods & Scott*, for appellant.

The waiver of Mrs. Hicklin is contained in a letter addressed to the tenant, stating that upon certain conditions the rent upon the Hicklin property will be waived. The party in favor of whom the rent will be waived is "any person" who will comply with the terms thereof, and the paper is certainly a conditional waiver—an inchoate waiver, which at any time may be made a valid and binding waiver, but which has no force and effect until the terms thereof are complied with.

What are the conditions which "any person" can take advantage of and thereby make the conditional waiver a binding contract between Mrs. Hicklin and himself?

(a) "Any person," "must aid you," "to the extent of $1,200."

(b) Such person must not only aid you to the extent of $1,200, but must in addition agree to aid you to make and gather a crop for this year (1899).

(c) This $1,200 must be advanced and aid given on "my plantation," not on any other plantation, but on "my plantation" in Bolivar county.

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Brief for appellant.

The parts of the above sentences in quotation marks are taken literally from the conditional waiver; the word "my" referring to Mrs. Hicklin, and the word "you" to W. D. Moore.

From the construction of the instrument it is plain that it was on condition of the "person who undertakes the business"—that is, advances you.

(a) To agree to aid W. D. Moore to make and gather a crop.

(b) That he must advance at least $1,200 for this purpose.

(c) That the advance must be made to be used on the Hicklin place alone.

The question between Gage & Company and Dreyfus is one of *estoppel in pais,* it not being contended that Dreyfus waived in writing or otherwise the rent claim.

The general law of estoppel may be stated to be "a preclusion of a person to assert a fact which has been admitted or determined under circumstances of solemnity, such as, by matter of record, or by deed, or by an act *in pais* inducing another to believe and act upon to his prejudice." 11 Am. & Eng. Ency. Law, 387.

Estoppel in pais are: (1) Misrepresentation; (2) Acquiescence and Silence.

The rule being that where A by words has represented, or by his silence when in good conscience he should speak out, intentionally or through culpable negligence, induces B to believe the existence of certain facts, and B has rightfully acted upon this belief, so that he will be prejudiced if A is permitted to deny the existence of such facts, then A is estopped from interposing a denial of such facts. 11 Am. & Eng. Ency. Law, 421.

The effect of estoppel is to put the party entitled to the benefit of the estoppel in the same position as if the thing represented were true. 11 Am. & Eng. Ency. Law, 423.

Fraud is an essential element of estoppel, and to establish

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Brief for appellee.

estoppel the proof must be clear, and unequivocal, and must also be affirmative. 11 Am. & Eng. Ency. Law, 424; *Roach v. Brannon,* 57 Miss., 490.

The representation must be inconsistent with the evidence proposed to be introduced. 11 Am. & Eng. Ency. Law, 420.

Statements of opinion where facts are open to both parties will not act as an estoppel. 11 Am. & Eng. Ency. Law, 425.

In order to establish an estoppel knowledge of all the facts is necessary. *Houston* v. *Witherspoon,* 68 Miss., 190.

And so knowledge of the facts by the party setting up the estoppel will preclude him from setting up the estoppel. 11 Am. & Eng. Ency. Law, 434.

The party must act upon the representation, and not upon the advice, of another, or upon knowledge acquired from another. 11 Am. & Eng. Ency. Law, 434.

There must be damage to the party setting up the estoppel by reason of the false statements. 72 Miss., 809.

In short, to establish *estoppel in pais* there must be: First—An admission inconsistent with the evidence afterwards sought to be given. Second—Action by the other party upon such admission. Third—Injury to him by allowing the same to be disproved. *Turnipseed* v. *Hudson,* 50 Miss., 429.

To establish estoppel by conduct there must be: First—A concealment or misrepresentation of the material facts. Second—The representation must be made with the knowledge of the facts. Third—The party to whom it was made must have been ignorant of the truth of the matter. Fourth—It must be made with the intention that the other party shall act upon it. Fifth—The other party must be induced to act upon it. *Turnipseed* v. *Hudson,* 50 Miss., 429.

Moore & Clark, for appellee.

Dreyfus very fully understood the nature of the security demanded by Gage & Company. He used every effort in his power to induce Gage & Company to accept the business, urged

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Brief for appellee.

upon them again the solvent credit they were extending when protected by this waiver rent, and never for one instant gave them or their attorneys the slightest intimation that he held the rent notes against this property, or that there would be any claim due him in preference to that of Gage & Company in the event they took this business.

By his own deposition he has stated clearly and distinctly that, having full knowledge of the fact that Gage & Company had demanded a waiver of the landlord's lien for rent, and that he further knew waiver had been submitted to them, which they did not and would not accept, but were demanding a further and more unconditional waiver, he deliberately concealed the fact that he had the rent notes in his possession. He thought it was essential to his own interest to say nothing about this. Silence, such as this, becomes a fraud and necessarily works an estoppel upon the party guilty of the fraud. *Staton* v. *Bryant,* 55 Miss., 261; *Roach* v. *Brannon,* 57 Miss., 490; *Kelley* v. *Wagner,* 61 Miss., 299; *Houston* v. *Witherspoon,* 68 Miss., 190; 11 Am. & Eng. Ency. Law (2d ed.), 421.

This cause was, on the former appeal, remanded to the lower court to be disposed of upon the merits, leaving, as we have above indicated, to the chancellor to pass upon the effect of the testimony and the estoppel by conduct, and all of the other mere questions of fact in this record. We do not believe that there is any ground to cavil at the decision rendered by the chancellor, since that decision was clearly right, but the doctrine is well established that in a case depending upon fact, where the evidence is conflicting and the mind cannot repose with confidence upon a conclusion in favor of either party, this court will not disturb a decision. *Wilson* v. *Beauchamp,* 50 Miss., 24; *Valentine* v. *McGrath,* 52 Miss., 112; *Randel* v. *Yates,* 48 Miss., 685; *Harrington* v. *Allen,* 48 Miss., 492; *Apple* v. *Ganong,* 47 Miss., 189; *Davis* v. *Richardson,* 45 Miss., 499; *Allen* v. *Smith,* 72 Miss., 689.

The presumption in favor of a decree includes conclusive-

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Opinion of the court.

ness, both of law and of fact. It will not be disturbed unless shown to be clearly wrong, being analagous in this respect to the verdict of a jury. *Partee* v. *Bedford,* 51 Miss., 84; *Derdeyn* v. *Donovan,* 81 Miss., 696.

Argued orally by *A. Y. Scott,* for appellant, and *Fred Clark,* for appellees.

TRULY, J., delivered the opinion of the court.

Upon the former appeal in this case (79 Miss., 406; 30 South., 691) it was decided that this "controversy is one as to priority of liens between the mortgagees and the landlord," and the cause was remanded for determination on the merits of the questions of waiver, estoppel, and priority of liens. Omitting consideration of all questions not necessary for decision, and accepting the finding of the chancellor upon conflicting testimony as conclusive, we find the following facts to exist: That Mrs. F. S. Hicklin was the owner of a plantation which was leased for a term of years to one W. D. Moore, and that the notes of the tenant, representing the annual rent, had been, with the knowledge of the tenant, assigned and delivered to L. F. Dreyfus. During the year 1898, Moore, the tenant, had been supplied by Dreyfus, and paid the rent for that year to him; but, the crop raised being insufficient to pay his account, a balance of $2,400 was due Dreyfus at the close of the year's business; this balance being secured partially by a trust deed on work stock, worth approximately $600. In the early part of 1899, Dreyfus refusing to further supply Moore, the tenant, he applied to appellees for $1,200 in advances to enable him to make and gather a crop on the Hicklin place. After some negotiations, appellees agreed to make the advances upon condition that the lien of the landlord for rent should be waived, and that Dreyfus should transfer his security on Moore's personalty. These terms being satisfactory to Moore, the matter was by appellees submitted to their attorneys to

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Opinion of the court.

prepare necessary papers. The landlord, Mrs. F. S. Hicklin, signed a waiver as required by appellees; and W. D. Moore having agreed with Dreyfus to pay him $300 out of the moneys to be advanced by appellees, and $300 out of his logging business, Dreyfus transferred to appellees, without recourse, the security which he held. During the course of the dealings between Moore and the attorneys for appellees, and before the final consummation of the transaction, Dreyfus urged the attorneys of appellees to make the loan to Moore, giving reasons why he personally could not continue the business; and, concealing the fact that he was the assignee of the rent notes, he represented that a waiver from Mrs. F. S. Hicklin, the owner of the land, would give appellees a prime lien on all the crops produced, and would make the loan absolutely secure. Acting on these representations, and in complete ignorance of the fact that Dreyfus was the holder of the rent notes, appellees' attorney demanded and received a waiver to the amount of $1,200 from Mrs. F. S. Hicklin, had the securities held by Dreyfus transferred to appellees, took a trust deed from Moore on crops and work stock, closed the loan, and forwarded the papers to appellees. The waiver of Mrs. F. S. Hicklin not being in form satisfactory to appellees, they demanded and received another waiver of rent, signed by her, and thereupon advanced Moore a portion of the $1,200 agreed on. Afterwards they required Moore to furnish additional security, which being done, other moneys were advanced during the year, aggregating a sum in excess of the $1,200 agreed on. After the crop was made and gathered, appellees had the trustee in their trust deed on such crops institute a suit in replevin against W. D. Moore for the possession of the fifteen bales of cotton raised on the Hicklin place, and other cotton not now in controversy. W. D. Moore gave bond, and the cotton was delivered to the sureties on his bond. Before the replevin suit was tried, L. F. Dreyfus filed his bill of complaint in the chancery court, enjoining the prosecution of the suit in replevin,

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Opinion of the court.

and averring that he had a prime lien on the cotton under the assignment to him of the rent note and landlord's lien. After voluminous pleadings, not necessary to detail, this cause was finally heard on pleadings and proof, and a decree rendered dissolving the injunction and awarding appellees the proceeds of the cotton; the chancellor holding that Mrs. Fannie S. Hicklin was bound by her waiver, and that L. F. Dreyfus was estopped from setting up any claim as assignee of the rent note and landlord's lien. From that decree this appeal is prosecuted by all parties defendant.

The first contention presented on behalf of appellant is that the court erred in holding that Mrs. F. S. Hicklin was bound by her waiver, because, it is said, appellees did not comply with the conditions expressed therein. To properly weigh the argument on this point, it is necessary to understand the relative positions of the parties, the circumstances which rendered the waiver necessary, and the considerations which induced Mrs. Hicklin to execute it. The conditions which confronted Mrs. Hicklin were these: Her plantation was leased to a man whose personalty and work stock were incumbered to an amount largely in excess of their value. The merchant who had advanced him money and supplies the previous year refused to continue the business, so that it became necessary for the tenant to procure elsewhere sufficient money to enable him to conduct his planting operations during the current year, and this he was unable to do, except upon condition that the lien of the landlord on the crops to be raised should be waived, and the existing trust deed upon his personalty should be transferred. The waiver was executed, therefore, as an inducement to some other merchant to make the necessary advances to the tenant, and thereby prevent the plantation from lying uncultivated. Under these circumstances, this was a perfectly natural arrangement. Mrs. Hicklin realized that without the waiver her tenant could not obtain advances, and, as a necessary consequence, she could receive no rent; while, by waiving

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her lien to a limited extent, she would insure the cultivation of her land, and still retain her right to demand as rent any cotton remaining after the amount specified in her waiver was fully paid. With this object in view, she executed an express waiver of her lien as landlord in favor of any person who would advance her tenant $1,200 to enable him to make and gather a crop during the year on her place. The motive of Dreyfus in assigning without recourse his trust deed on the personalty of Moore is also perfectly apparent. Not desiring to risk further advances to a customer whose business had not proved profitable the previous year—anxious to shift the burden and risk—he was still more concerned in having Moore's farming operations continue uninterruptedly. Under the agreement between Dreyfus and Moore, if they could succeed in inducing appellees to advance Moore, Dreyfus was to receive $300 of the money so advanced, and, in addition, $300 out of Moore's logging business; thereby securing the full value of the security which he waived. In addition to this, he would be entitled to the proceeds of any cotton which Moore might have after the account for advances was fully paid; such proceeds to be applied to the satisfaction of the rent note of which he was the assignee. For these reasons he was ready and willing to assist in the consummation of a transaction by which he risked nothing, but, on the contrary, had everything to gain. The fact that the trust deed from Moore to appellees, as beneficiaries, stated that the money was to be used in making a crop on other lands, in addition to the Hicklin place, and that it contained no express stipulation obligating appellees to advance the sum of $1,200 therein mentioned, under any and all circumstances, does not affect the rights of the parties concerned. The waiver was express and absolute in its terms, with the sole condition that the person undertaking Moore's business was to aid him "to make and gather the crop for this year on the Hicklin plantation;" and the rent lien was, in favor of any person so aiding the tenant, thereby waived "to

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the extent of $1,200." Appellees undertook the business under the terms of the waiver, and advanced not only the amount therein specified, but also a sum in excess thereof, and all that was required to "make and gather" the crop on the Hicklin plantation. This was all that Mrs. Hicklin stipulated for, and was a full compliance on the part of appellees with the condition expressed in the waiver. Conceding that any part of the money advanced by appellees was by Moore used in cultivating crops not on the Hicklin place, this would be simply a question of fair dealing between the landlord and her tenant, and would not affect the rights of appellees to hold Mrs. Hicklin to the terms of her waiver. It was certainly not the intention of the parties that appellees' rights under the waiver were to be contingent upon the manner in which Moore used the money advanced, or the purpose to which it might be devoted. The chancellor decided, as a finding upon a disputed question of fact, that appellees fully complied with all the conditions and stipulations of the waiver, and the facts above detailed prove conclusively that this decision was fully warranted. The failure of the crop was a contingency which confronted Mrs. Hicklin when she executed the waiver, and the fact that she received no rent for the year 1899 is one of the misfortunes incident to the leasing of lands.

The second contention of appellant is that the court erred in holding that L. F. Dreyfus was estopped by his conduct and declarations from claiming any landlord's lien as assignee of the rent note on the cotton in question. The doctrine of estoppel by conduct rests upon the principle that it would be a fraud in a party to assert what his previous conduct had denied, when, on the faith of that denial, others have acted so that injury would befall such others if the truth of the fact or previous declarations should afterwards be denied. *Staton* v. *Bryant,* 55 Miss., 261. The rule is again correctly stated as follows: "It is a universal law that if a man, either by words or conduct, has intimated that he consents to an act which has been

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done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct. When others are innocently induced to acquire rights in derogation of the secret or undisclosed claims of those who cause such action, the rights so acquired are secured, whether contested at law or in equity." Bigelow, Estoppel, ch. 18. Viewing the conduct and declarations of Dreyfus in the light of the rule above announced, we find, according to the testimony which the chancellor accepted as true, that Dreyfus, while the owner by assignment of the rent note, and alone having the right to assert a landlord's lien upon all agricultural products raised on the leased premises, intentionally concealed that fact from the attorney and representative of appellees, and actively assisted W. D. Moore in procuring advances from appellees by advising the attorney in question that the security would be ample for the advances to be made, and that the waiver from Mrs. Hicklin of her lien as landlord would vest in appellees a prime lien on all the agricultural products which Moore might raise on the Hicklin plantation. We find, further, that, acting upon these false and fraudulent representations, appellees procured the waiver; and we find, from Dreyfus' own statement, that he was advised of this fact, and did not object thereto, but deliberately persisted in the concealment of his claim as assignee, allowing appellees to deal to their detriment on the faith of their belief in a state of facts which he had intentionally led them into believing, and which he knew to be false. Under such circumstances it would be shocking to every sense of right, as it would be violative of the principle of common honesty, to now allow this claim to be asserted, to the injury of the parties so intentionally and fraudulently misled. It would be hard to imagine a case more ap-

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propriate for the application of the doctrine of equitable estoppel than the one at bar. Every element needed is here found: A false representation and a concealment of material facts, made, with actual knowledge of the facts, to one actually and permissibly ignorant of the truth, with the intent that it should be acted on, and the innocent party induced to act on it, and to his detriment and loss; the one not only concealing his knowledge of the true facts, but asserting the existence of an entirely different state of facts. To allow such a one now to enjoy the fruits of his iniquitous dealing would be to place a premium upon successful deception, fraud, and dishonesty. This we decline to do. We concur heartily with the chancellor in this conclusion.

Affirmed.

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MARY HARRIET OSTRANDER v. CLEMMIE QUIN ET AL.

INFANTS. *Contracts. Misrepresentation of age. Estoppel. Mortgage. Necessaries.*

Where a borrower obtained a loan of money on the faith of his representation that he was an adult, he cannot defeat a mortgage given to secure the loan because of his infancy at the time, especially where the money was used by him in the purchase of necessaries.

FROM the chancery court of Lowndes county.

HON. JAMES F. MCCOOL, Chancellor.

Mrs. Ostrander, appellant, was complainant in the court below; Mrs. Quin and others were defendants there. From a decree in defendants' favor the complainant appealed to the supreme court.

Miss Mary Harriet Edmondson, now Mrs. Ostrander, the appellant, on the 28th of December, 1899, being at that time only eighteen years, five months and twenty-four days old, but sufficiently matured to be easily believed to be an adult, bor-

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Brief for appellant.

rowed money from the appellee, Mrs. Quin, and she executed a deed of trust to secure the loan, one Cooper, an appellee, being the trustee therein. Miss Edmondson used the money so borrowed in the purchase of necessaries. She married one Ostrander before the beginning of this suit. The other facts are stated in the opinion of the court.

Denton & Cox, Betts & Sturdevant, and *Frank Johnston,* for appellant.

Cooper, trustee, had actual and positive notice of the minority of appellant at the time she executed the deed of trust to him, and this notice is imputed to Mrs. Quin, the beneficiary. *Pope* v. *Pope,* 40 Miss., 516 (44 L. R. A., 306). We need not cite authorities to show that notice to an agent extends to and binds his principal. 14 Am. & Eng. Ency. Law, 111; 1 Am. & Eng. Ency. Law, 1144. The trustee sustains the very closest fiduciary relationship to the beneficiary in his trust deed, and there is no reason why the rule of notice to an agent should not also apply to a trustee. The trustee is really the agent of both the other parties. 26 Am. & Eng. Ency. Law (1st ed.), 878.

The deed under which appellant derived her title to the land involved in this litigation recited the fact that she was eighteen years of age on July 4, 1899, and this deed, being recorded, gave notice to appellee of all facts recited therein. A purchaser of land (or mortgagee) is conclusively presumed to know what appears on the face of the title papers under which he claims. This presumption extends to all facts stated in all recorded deeds throughout the whole chain of title, and the purchaser is put upon inquiry as to any facts even suggested therein. He cannot even rely on statements made to him by his grantor which contradict such recitals. 24 Am. & Eng. Ency. Law, 144; *Ib.,* 151; 23 Am. & Eng. Ency. Law, 508. See also *Deason* v. *Taylor,* 53 Miss., 697; *Stewart* v. *Matheny,* 66 Miss., 21; *Allen* v. *Poole,* 54 Miss., 323; *Plant* v. *Shyrock,* 62 Miss., 821; *Gordon* v. *Sizer,* 39 Miss., 805.

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Brief for appellant.

Mrs. Quin had known Mrs. Ostrander from childhood, and was sufficiently acquainted with her to know that the representations as to her age were false (conceding that such representations were made, which is denied), or at least Mrs. Quin had sufficient information to suggest further inquiry, and she cannot complain if she has suffered by reason of her own negligence. This rule is recognized in equity as well as law. 14 Am & Eng. Ency. Law, 115 to 117. A defrauded party cannot complain where he has ample means of knowing the truth. 37 L. R. A., 597, notes.

Before appellee can complain of fraud, she must not only show that the statement made by appellant as to her age was false and that it was made with intent to deceive her, but she must also show that it actually did mislead and deceive her; or, in other words, that sh erelied on the statement. 14 Am. & Eng. Ency. Law, 106; 16 Am. & Eng. Ency. Law, 293.

If appellant made the alleged representations, thinking that she was of age because she had arrived at the age of eighteen years, she is not estopped to disaffirm her act. *Brantley* v. *Wolf,* 60 Miss., 420. It is only designing fraud which will ever estop an infant, and such fraud must be affirmatively and positively shown. *Demourelle* v. *Piazza,* 77 Miss., 433.

It cannot be disputed that appellant may disaffirm her act as to Cooper, the trustee, because he stated positively that he knew she was not twenty-one years old. This being true, he had no right to foreclose the trust deed given by appellant, and the injunction sued out herein to prevent him from doing so should be sustained, regardless of Mrs. Quin's connection with the case. He is the holder of the legal title, and if the deed of trust may be disaffirmed as to him, it may be disaffirmed altogether.

There is no merit in the contention that the money received by appellant from appellee was furnished her to buy necessaries. *Brent* v. *Williams,* 79 Miss., 355.

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Brief for appellee.

William Baldwin, for appellee.

The court will observe the distinction: Mrs. Quin is not suing appellant, Mrs. Ostrander, in a court of law, for her land, with the plea of infancy set up. That is not the question at all. It is not contended that where suit is brought in a law court against a party for his or her land, based upon a deed executed during minority, that the plea of infancy must be accompanied by a tender of the price received. Such is not claimed to be the law. But it is claimed that where a minor has, under the facts disclosed by this record, procured the money of another, that the minor having become of age cannot come into a court of equity and ask its aid without returning the money. 1 Pomeroy Eq. Jur., sec. 391; 1 Story Eq. Jur., sec. 641, note e; *Deans* v. *Robertson,* 64 Miss., 197.

The loan of money secured by the deed of trust sought to be cancelled was procured by such fraudulent representations as to complainant's age that a court of equity will not permit her to set up her alleged infancy to the injury of Mrs. Quin. This court in *Ferguson* v. *Bobo,* 54 Miss., 134, upon this subject, has this summary of the law—to wit:

"It may be stated as a general proposition, fully borne out by the authorities, that whenever an infant who has arrived at the years of discretion, by direct participation or by silence, when he was called upon to speak, has entrapped a party, ignorant of his title or his minority, into purchasing his property from another, he will be estopped in a court of chancery from setting up such title." Citing authorities. And continuing: "How long before this doctrine will be fully adopted by courts of law, as so many equitable principles have been, the future history of our jurisprudence must determine." 16 Am. & Eng. Ency. Law [2d ed.), 292.

It is submitted that it would be hard to find a case calling more strongly for this beneficent principle of equity and common honesty than the case at bar, where this appellant has by the grossest misrepresentation procured the money of an

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old widow, who was trying to befriend her, and coming into a court of equity and asking the court to hold the old lady while she robbed her. It is contended that because Cooper, the trustee, in the deed of trust, knew that the maker of this deed of trust was under the age of twenty-one years, that such knowledge by the trustee is imputable to the beneficiary, Mrs. Quin, and the case of *Pope* v. *Pope,* 40 Miss., 516, is relied on to sustain the contention. It is submitted that that case decides no such proposition. The decision of the court in *Pope* v. *Pope* was to the effect that, inasmuch as the beneficiary in that deed of trust was not a purchaser for value, the security being pre-existing, that fraud in the grantor being proved the instrument was not protected by the *bona fides* of the beneficiary.

After so deciding, the court then goes on to state that another weakness of the case was that, inasmuch as the trustee in that case was acting "by agreement" for the beneficiary, and in another place "acting under the authority" of the beneficiary, that notice to him was notice to the beneficiary.

The case is simply an enunciation of the familiar principle that notice to an agent is notice to his principal. But even if the principle contended for by counsel be true—and such is not conceded, but denied most emphatically—that notice to a trustee in a deed of trust is in all cases notice to the beneficiary, it is submitted that this case is not one calling for its application or permitting its application.

It certainly could not be applied in a case like this, where the equity of the beneficiary is, that she, the beneficiary, was deceived and misled by the express misrepresentations of the grantor.

CALHOON, J., delivered the opinion of the court.

This record presents a bill by appellant to enjoin a sale of land by the trustee in a trust deed to secure appellee, without tender of the money had, on the ground that appellant was a minor when she made it. Mrs. Quin's answer sets up igno-

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rance of the age of Mrs. Ostrander, and that she (Mrs. Quin) was a widow, of limited means, and that appellant came to her and said she was in great need and wanted the money for the necessaries of life; that she was of age and competent to make the deed; and that, believing and relying on this statement, she loaned the little money she had, and that otherwise she would not have done so; and that appellant did use it for the necessaries of life. Mrs. Ostrander was a mature woman, over eighteen years of age, and of discretion. The testimony was conflicting, but the chancellor manifestly thought, from the evidence, that the answer was sustained, and that the misrepresentations were made and relied on, and he decreed for appellees. The willful misrepresentation of age by which money is had of another on a mortgage, and which deceives the lender, is a bar to an avoidance of it, on the solicitation in equity of the borrower, especially where the fruits of the fraud are not tendered back. *Ferguson* v. *Bobo,* 54 Miss., 121; *Levy* v. *Gray,* 56 Miss., 318; *Brantley* v. *Wolf,* 60 Miss., 430; *Yeager* v. *Knight,* 60 Miss., 732; *Wilie* v. *Brooks,* 45 Miss., 542; *Upshaw* v. *Gibson,* 53 Miss., 341.

Affirmed.

WHITFIELD, C. J., specifically concurring.

I concur on the specific ground that the chancellor found, on the evidence, that the money borrowed was used in the purchase of necessaries.

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Statement of the case.

WEAR-BOOGHER DRY GOODS COMPANY *v.* WILLIAM M. KELLY, CLAIMANT.

STATUTE OF FRAUDS. *Code* 1892, § 4225*a*. *Debt, default, or miscarriage of another.*

Where the purchaser of goods promised the seller to pay the purchase money to a creditor of the seller, the promise is not within the statute of frauds, Code 1892, § 4225*a*, providing that an action shall not be brought whereby to charge a defendant upon any special promise to answer for the debt or default or miscarriage of another person.

FROM the circuit court of Union county.

HON. PERRIN H. LOWREY, Judge.

The Wear-Boogher Dry Goods Company, appellant, was plaintiff in the court below, and one Charles E. Kelly was defendant there. The suit was an attachment, and certain property having been levied upon as the property of defendant in attachment, the same was claimed by William M. Kelly, claimant and appellee. The trial of the claimant's issue resulted in a judgment for appellee, the claimant, and the plaintiff appealed to the supreme court.

Charles E. Kelly was engaged in the mercantile business at Poplar Springs, Miss., and was largely in debt, and some of his creditors were pressing him. He was unable to meet all of his obligations, and on October 17, 1898, he sold his stock of goods and books of accounts to his father, William M. Kelly, the appellee. At the time of the sale he owed William M. Kelly $500, evidenced by his promissory note. He executed a bill of sale to William M. Kelly, which recites that the consideration for the sale was the extinguishment of the debt for $500, and the assumption by William M. Kelly of the pay-

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Brief for appellee.

ment of certain indebtedness due by Charles E. Kelly to the Bank of Tupelo, Mr. S. E. Mitchell, J. C. Bailey, and Clark, Hood & Co. The aggregate of these various debts was $2,650. On November 10, 1898, the Wear-Boogher Dry Goods Company sued out an attachment against Charles E. Kelly, and the stock of goods and accounts bought by William M. Kelly were levied on. William M. Kelly made claim for the goods.

On the trial of the claimant's issue considerable testimony was taken as to the value of the stock of goods, which was variously estimated at from $1,800 to something over $4,000. William M. Kelly paid all the debts the payment of which he had assumed.

W. H. Clifton, for appellant.

Counsel cited the following authorities:

Richards v. *Vaccaro,* 67 Miss., 518-521; 1 Story's Equity, 244, 246; Kerr on Fraud, 186, 187 (note 2), 188, 189; Wait on Fraudulent Conveyance, 232; *Newman* v. *Meek,* Freeman's Ch., 458; *Allen* v. *Martin,* 61 Miss., 86; *Swaford* v. *Garmon,* 51 Miss., 352; *Kaufman* v. *Whitney,* 50 Miss., 110, and cases cited in brief, p. 105; 2 Pomeroy's Equity, 927, 928; 8 Ency. Law, 782, 783; *Wynne* v. *Mason,* 72 Miss., 430; *English* v. *Friedman,* 70 Miss., 459; *Bernheim* v. *Dibrell,* 66 Miss., 203; 8 Ency. Law [1st ed.], 770, citing the famous English case of "Twines;" *Atkinson* v. *Greaves,* 70 Miss., 45; *Bamberger* v. *Choolfield,* 50 L. ed. U. S. Rep.,379; Wait on Fraudulent Conveyance, sec. 369, p. 485; 8 Ency. Law [1st ed.], 756; 2 Pomeroy Equity, sec. 750; 2 Pomeroy, sec. 751, note 1, citing authorities; *Pollock* v. *Simmons,* 76 Miss., 210; *Bank* v. *Strouse,* 66 Miss., 484, citing authorities; *Ware* v. *Allen,* 64 Miss., 545.

H. D. Stephens, and *G. L. Jones,* for appellee.

It was not essential that the promise of W. M. Kelly to pay these debts should be in writing, to bind him. "A promise made to a debtor to pay a debt which he owes to a third person

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is not a promise to answer for the debt of another within the meaning of the statute of frauds." *Ware* v. *Allen et al.*, 64 Miss., 545.

"The obligation to pay the debts of the vendor to a third person, though in parol, is not obnoxious to that provision of the statute of frauds which requires all undertakings to pay the debts of another to be in writing. Such assumptions are not within the statute. The contract is not to pay the debts of another, but to pay the party's own debt to some person other than his creditor." *Lee* v. *Newman,* 55 Miss., 373; Browne on Statute of Frauds [4th ed.], 193, 194; Story's Eq. Jur. [12th ed.], s. c., 973 and 1044; *Fullam* v. *Adams,* 37 Vt., 397; *Barker* v. *Bradley,* 42 N. Y., 316; 1 Am. Rep., 521; *American Lead Pencil Company* v. *Wolfe,* 11 So. Rep., 488; *Scudder* v. *Cartner,* 43 Ill., 252; *Putney* v. *Farnham,* 27 Wis., 187; 9 Am. Rep., 459.

Argued orally by *G. L. Jones*, for appellee.

WHITFIELD, C. J., delivered the opinion of the court.

Kelly was irrevocably bound under the law as applied to the facts of this case. The principles have been thoroughly established in *Ware* v. *Allen,* 64 Miss., 547; 1 South., 738; 60 Am. Rep., 67; *Lee* v. *Newman,* 55 Miss., 373; *Sweatman* v. *Parker,* 49 Miss., 19. The law is the same elsewhere. *Fullam* v. *Adams,* 37 Vt., 397; *Putney* v. *Farnham,* 27 Wis., 187; 9 Am. Rep., 459; and other authorities cited in the excellent brief of counsel for appellee.

Affirmed.

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Statement of the case.

THEODORE KNOOP ET AL v. COLUMBUS COMPRESS COMPANY.

BAILMENTS. *Action by bailor. Evidence. Bookkeeping bad.*

A bailor in an action against a bailee for the value of the subject of the bailment is not precluded from making out his case by other competent evidence because he cannot make an intelligent statement of his losses from his own badly kept account books.

FROM the circuit court of Lowndes county.

HON. EUGENE O. SYKES, Judge.

Knoop and others, appellants, composing the copartnership of "Knoop, Freirick & Company's Agency," were plaintiffs in the court below; the Columbus Compress Company was defendant there. From a judgment in defendant's favor the plaintiffs appealed to the supreme court.

The plaintiffs had delivered to defendant during the cotton season, 1901-02, a large number of bales of cotton for compression and storage. At the end of the season the plaintiffs claimed that they had so delivered twelve bales, which defendant had not returned to them. This was denied by defendant. Plaintiffs sued for the value of the twelve bales in dispute. It appeared upon the trial that the plaintiffs were, because of their own bad bookkeeping, unable to present from their books of accounts an entirely clear and intelligent statement of their losses. They did, however, introduce other testimony tending to prove their declaration. The court below gave defendant an instruction, the one referred to in the opinion of the court, in these words: "If the jury believe from the evidence that plaintiff so negligently conducted its business that it cannot ascertain for itself, nor furnish the jury, any data as to the amount of its loss, if any it has received, then the jury will find for the defendant."

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Brief for appellee.

E. T. Sykes, and *C. H. Hale,* for appellants.

Over the objection of appellants counsel for appellee were permitted to go into a lengthy examination and cross-examination as to the condition of appellants' books. It is obvious that if appellants' books had been entirely destroyed by fire, their right to recover for cotton delivered and not accounted for would not have been destroyed. The appellee had admitted the receipt of the cotton sued for, and the state of the appellants' books could in no way affect the question whether appellee had re-delivered the cotton according to appellants' order. The question being, "Did appellees re-deliver the cotton sued for?" any questions asking in substance, "Did appellants keep a good set of books?" elicited totally irrelevant testimony. What has bookkeeping to do with the case? The receipt was admitted and the demand proved. *Mortimore* v. *Ragsdale*, 62 Miss., 86.

The first instruction given for appellee is incorrect as a matter of law, and is inapplicable under the state of facts proved in this case. It is incorrect in law, for it makes the plaintiffs' right to recover depend upon their system of bookkeeping, and upon that exclusively. It ignores the possibility, in this case the fact, of plaintiffs' being able to produce evidence from other sources than their books, such as defendant's receipts, and tells the jury that if plaintiffs kept books badly, they must lose their property, even though they should be able to prove its conversion by other evidence. It is further erroneous in that it enables defendant to present as a defense, not its performance of its admitted contract, but plaintiffs' bookkeeping.

William Baldwin, for appellee.

The testimony of the plaintiffs' only witness, John S. Hale, was wholly overturned, and his statement and alleged showing made by his books and papers was absolutely discredited by his own statements and admissions made and repeated that the

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books of the plaintiffs were in such condition that no man could make anything out of them.

These admissions were enough to completely discredit any claim based thereon, and the jury was entirely right in refusing to find a verdict based upon them.

Argued orally by *E. T. Sykes,* for appellants.

WHITFIELD, C. J., delivered the opinion of the court.

The instruction No. 1, given for the defendant, was fatally erroneous. The plaintiff might recover quite independently of its bad bookkeeping, if the case was otherwise satisfactorily made out; and the court restricted plaintiff's rights within too narrow limits, in requiring it to recover, if at all, on its own correct bookkeeping. If the receipts of the compress, under its peculiar course of business, coupled with the other testimony, showed the defendant liable, then, in the absence of satisfactory explanation by defendant, the plaintiff should have recovered, whether its mere bookkeeping was perfect or not. The cuttlefish defense, whereby plaintiff's right to recover otherwise was obscured by the cloud raised by its bad bookkeeping, should not have been permitted to wrest justice and mislead the jury.

Reversed and remanded.

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Brief for appellant.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY v. EUGENE A. METCALF.

1. RAILROADS. *Code* 1892, § 3549. *Backing train. Passenger depot.*

Code 1892, § 3549, regulating the backing of trains near passenger depots:

(*a*) Is not restricted in its application to any particular class of persons;

(*b*) Is a regulation intended to preserve and protect human life and limb, and should be given full scope in accordance with its plain meaning and not restricted by strained interpretation; and

(*c*) Affords protection to all persons injured by a backing train within three hundred feet of a passenger depot; the phrase "within fifty feet thereof" refers to the distance from the depot to the nearest point of the track on which the train is backing.

2. SAME. *Walking between tracks. Gross negligence. Licensee.*

Where a railroad company permitted and impliedly consented to the use by the public generally of a path between two of its tracks near a passenger depot, and the plaintiff, thoroughly familiar with the surroundings, while using the path on a dark night was injured, within three hundred feet of the depot, by a rod negligently permitted to protrude from an engine backing into the depot, the plaintiff's use of the path was not, as a matter of law, such gross negligence as to take the case without the statute.

FROM the circuit court of, second district, Bolivar county.

HON. A. McC. KIMBROUGH, Judge.

Metcalf, the appellee, was plaintiff in the court below; the railroad company, appellant, was defendant there. From a judgment in plaintiff's favor the defendant appealed to the supreme court. The facts are stated and the code section involved quoted in the opinion of the court.

Mayes & Longstreet, J. M. Dickinson, and *Scott, Woods & Scott,* for appellant.

The plaintiff was guilty of gross and willful negligence in going upon the railroad track at the hour of the night and

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under the condition where he was surrounded with impenetrable darkness, and when, by no reasonable presumption, passengers or travelers could be expected to be in or about the depot or upon the tracks of the company.

In this case the plaintiff invokes annotated code of Mississippi, sec. 3549, and if this section is applicable, contributory negligence would be no excuse. But can it not be fairly said that reckless conduct on the part of the plaintiff, such as the evidence discloses, should be differentiated from mere contributory negligence and prevent a recovery? *R. R. Co.* v. *Jones,* 73 Miss., 123.

However that may be, we submit that sec. 3549 is not applicable to the case at bar.

The spirit as well as the language of the statute will show that it was simply intended to protect those persons who were within fifty feet of a passenger depot at the time they were injured. It is true that the statute requires that where an engine is backing, a servant of the company shall precede it when within three hundred feet of a passenger depot; but this precaution is simply intended as a protection to those persons who are within the statutory limit—to wit, fifty feet of a passenger depot; and if a party is injured beyond that limit, he cannot successfully invoke the statute, although, when the injury occurs, he may be within three hundred feet.

This seems quite clear on a careful analysis and consideration of the object of the act, although the language itself is not altogether free from ambiguity. Some apt illustrations may assist us in construing the law. For instance, if a railroad train, or locomotive, backing, without a servant preceding it as the statute requires, should injure a party when two hundred feet away from a passenger depot, and should instantly stop right where such injury occurred, and pull out in the direction from whence it came, without going nearer such passenger depot, or ever coming within fifty feet thereof, it is very clear that the statute would not apply.

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Brief for appellant.

Or, to put it somewhat differently, if the same train, after injuring a party two hundred feet from a passenger depot, instead of stopping and going away from the depot, as just suggested, should keep backing in the direction of that building, but, before getting within fifty feet of it, should take a side-track carrying it past the depot, but never within fifty feet thereof, the statute could not be invoked.

Again, suppose there are two tracks passing a passenger depot, one say forty-two feet from it and the other ten feet further off, and that two trains were backing toward the depot, one on each track, disregarding the statutory requirements; and that a man was injured by each of these trains, the injury on the track passing within forty-two feet of the depot occurring at a point two hundred and seventy-five feet away from the depot; while the injury to the man on the other track occurred immediately opposite the depot, within fifty-two feet of it. If the plaintiff's construction of the statute is correct, the man who is two hundred and seventy-five feet from the depot is protected by the additional safeguards mentioned in sec. 3549, while the man who is only fifty-two feet from the depot is not so protected. The mere fact that the locomotive inflicting the injury passed, after such injury was inflicted, within fifty feet of the passenger depot, should not have any significance; and on the whole it seems plain that the whole intendment of the statute was to provide special safeguards for those who were within fifty feet of a passenger depot, and none others.

It is well known that large crowds congregate around and near the passenger depots throughout the state, in the country as well as in the towns and cities; and for this reason it was deemed necessary or desirable to take additional precautions for their protection. The object to be attained by the law was to protect people within the prescribed limits, by requiring the railroad company to observe certain precautions, so that when the backing train or locomotive came within three hun-

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Brief for appellee.

dred feet of that building, the parties within the protected zone—to wit, fifty feet—could thus see the warnings when the train or locomotive itself was from two hundred and fifty to three hundred feet away; while the company's servant could see them at a like distance; and so both could have time and opportunity to guard against accidents.

See *Railroad Co.* v. *McCalip*, 76 Miss., 367, and note especially the language of Chief Justice Woods, as follows:

"The statute seems intended to compel the railroad company to observe a new rule of care and watchfulness in backing trains within fifty feet of a passenger depot and to afford protection to all persons within the prescribed limits."

Sillers & Owen, and *Alexander & Alexander,* for appellee.

The track upon which the engine was backing ran within twenty-five feet of the passenger depot. The engine was moving at a rapid rate of speed, without any forerunner on foot to give warning. This section does not mean that no forerunner of the engine or train is needed except when the said engine or train is within fifty feet of the depot. Its meaning is that when a train or engine is backing along a railroad track, which track runs within fifty feet of the passenger depot, then when the train or engine thus backing comes within three hundred feet of the depot there must be a servant running in advance on foot to give warning. This section, like sec. 3546 (concerning trains running over six miles an hour in municipalities), is made for the safety of the public in towns and places where there are many people usually passing along a point over which the railroad train must pass. Our court has always been liberal in its construction of both secs. 3546 and 3549 of the code. For instance, sec. 3549 says that the "railroad company shall be liable for injuries sustained by any one from its locomotive or cars whilst they are running over six miles an hour through a municipality." Our court has decided that this statute governs where the train has been running at an excessive rate of

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Brief for appellee.

over six miles an hour, as, for instance, where stock is killed by a locomotive, although the engine is checked when the animal is seen and strikes it when running at a less rate of speed. *Railroad Company* v. *Toulme,* 59 Miss., 284. And under sec. 3549 it is no defense of itself that at the moment of collision the train was running less than six miles an hour. *Railroad Company* v. *Jordan,* 63 Miss., 458. The court will liberally construe sec. 3549 in favor of the public for whose protection it was enacted by the legislature. But Metcalf's case is well within the statute. He was only two hundred and sixty-five feet from the passenger depot. The backing engine was to pass within fifty feet of the depot, and did. The statute says that there was necessity for the servant to begin to precede the engine for at least three hundred feet before it reached, or came opposite to, such depot. Inasmuch as the servant may precede the engine "not exceeding forty feet, nor under twenty feet in advance," if the meaning is that there is no necessity for the servant to begin to precede the engine until the engine is within fifty feet of the depot, then the servant (having the right to go as far as forty feet in advance) would have to start only ten feet from the depot on his march down the track to give warning of the approaching engine. This is not the meaning of the section. If it were, then there would be no protection in our crowded cities under this section for those persons who must be, say within thirty or forty feet along the railroad track away from the depot and in the pathway of the engine, inasmuch as the servant would begin his march of warning at a point closer to the depot than these persons. The true purpose of the section is that inasmuch as passenger depots are public places, oftentimes crowded by reason of excursions or other important occasions, as often the crowds may extend even as far as three hundred feet from the depot along the track, there is necessity even at this distance of three hundred feet for warning to be given of a train which may be intending to plow its way toward the depot.

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Opinion of the court.

There is no question but that a backing train can come upon a person more insidiously than advancing with the engine in the lead. The engine makes the most noise in a train. Its headlight is a warning by night. Furthermore, the engineer having control of the train can keep a lookout against danger. But where an engine is backing along there is no headlight, and even where lanterns are carried upon the tender of an engine which is backing, this is scarcely any notice of warning by reason of the lanterns' faint lights, which are not directed upon the track. And, furthermore, where a long train is being backed and the heavy Pullman cars glide along without noise, a person may be run over at or near the depot, even before the engine, although attached to the train, is near enough for its noise or bell or warning to give notice of the coming danger.

The court will thus see that in the absence of any proof showing gross contributory negligence it was incumbent upon the jury to find for the plaintiff under the facts. The railroad company could not allege or set up as a defense contributory negligence.

TRULY, J., delivered the opinion of the court.

Appellee, while walking between two railroad tracks on a cinder path constructed and maintained in the town of Cleveland by the appellant railroad company, within three hundred feet of a passenger depot, but more than fifty feet therefrom, was struck by a bar or other object protruding from an engine which was rapidly backing into the said passenger depot on a track which ran within fifty feet thereof, and while there was no employe walking in front of said engine to give warning. By this accident injuries were inflicted, for which suit was brought, and under the instructions of the court verdict and judgment were rendered in favor of appellee, awarding him compensation for the injuries suffered. From this judgment this appeal is prosecuted by the railroad company.

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Appellee was confessedly a mere licensee upon the occasion in question. He was on the premises of appellant upon his own errand, and upon no invitation of the appellant. The record here made presents the sole question whether one injured while so situate is entitled to recover compensatory damages under § 3549, Code 1892. It is insisted by appellant that the case now under consideration does not come within the purview of that statute, nor is it within the intendment of the legislature. The section in question is as follows: "It shall be unlawful to back a train of cars, or a part of a train, or an engine, into or along a passenger depot at a greater rate of speed than three miles an hour; and every such train, part of a train, or engine backing into or along a passenger depot, and within fifty feet thereof, shall, for at least three hundred feet before it reaches or comes opposite to such depot, be preceded by a servant of the railroad company on foot, not exceeding forty nor under twenty feet in advance, to give warning. For every injury inflicted by a railroad company while violating this section, the party injured may recover full damages without regard to mere contributory negligence." It is contended that a reasonable construction of that statute, when considered in the light of the existing evil for which the legislature intended thereby to prescribe a remedy, does not embrace the case of a person situate as was appellee, even though injured. In this connection it must be noted that the language of the section says that a railroad company shall be liable "for every injury" inflicted while violating this section, and that "the party injured" may recover full damages. In *Railroad* v. *Carter*, 77 Miss., 511 (27 South., 993), interpreting a similar statute where it was sought to have the court limit the scope of the statute to certain classes of persons, it was said that this court would not undertake to restrict the effect of a statute which, by broad and general terms, included every class of persons; and that to hold a statute general in its terms was only applicable to certain cases would be "judicial legislation."

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Opinion of the court.

It should further be observed that in *Railroad Company* v. *McCalip*, 76 Miss., 367 (25 South., 166), this court, in construing this identical section, held that it granted the action and the remedy to all classes of persons, whether citizens engaged in their ordinary and lawful business, intending passengers, idlers, or tramps. We see no reason to think it the design of the legislature to restrict the protection intended to be afforded by the section now under review to any special class of persons. It was a legislative recognition of the fact that passenger depots and the grounds adjacent thereto are always liable and likely to be much frequented, where constant watchfulness is required to prevent injury and loss of life.

It is further argued by appellant that the circumstances attendant upon the injury in the instant case are such as to brand the conduct of the appellee as grossly negligent; that he was walking through a railroad yard, upon a dark night, where there were no lights displayed, and amid atmospheric conditions which prevented the use of his eyesight in order to ward off approaching danger, or to see that such danger was imminent. The code section being considered says "the party injured may recover full damages without regard to mere contributory negligence." In viewing the conduct of appellee, it should be borne in mind, in addition to the facts relied upon by appellant, that he was thoroughly familiar with his surroundings; that he and the public generally had for many years continuously, and with the knowledge and implied consent of the employes of appellant, used the cinder path through the railroad yard on which he was injured as a public walkway in passing from one portion of the town to another; that he was not in a place of obvious danger; he was not on the roadbed of any track, but was injured by a bar or other object negligently permitted to protrude from the engine. If appellee received the injury complained of within the limits prescribed by the section in question, we hold that he does come within its provisions, and that his conduct did not evince such pal-

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pable and gross negligence as would authorize a trial judge to grant a peremptory instruction against him on that account.

The remaining and strongly urged contention of appellant is that sec. 3549 does not apply to injuries occurring more than fifty feet from a passenger depot, and, as the injury in question did happen more than that distance from a passenger depot, appellee is not entitled to recover under the terms of the statute. In support of this proposition, an expression in the opinion of this court in the case of *Railroad* v. *McCalip, supra,* is relied on. The point now being considered was not involved in the McCalip case, for there the injury occurred upon a crossing which was within fifty feet of a passenger depot, and in that case the railroad company sought to escape liability under the plea that the section did not apply to injuries at crossings, but was designed for the protection of intending passengers. That was the exact and only necessary point of decision, though it is true that during the course of that opinion it was stated that this section was designed to establish a new rule for the protection of the public generally within the prescribed limits of fifty feet. We must, however, in construing the section in reference to the question now presented, consider it as a whole, bearing in mind the cardinal rule of interpretation that all parts of a statute must be so construed, if possible, as to make them harmonize as an entirety. Will the interpretation placed upon the section by appellant fulfill the requirements of this rule? We think not. To our minds, the manifest meaning of the section is that where a train, part of a train, or engine is backing into or along a passenger depot, "and within fifty feet thereof," the distance so mentioned refers solely to the question of whether or not the track on which such train is backing comes within the stated distance of the depot. Any other construction would have the effect of absolutely annulling that clause which requires that an employe of the company shall walk in front of the train to give warning "for at least three hundred feet before it reaches or comes opposite to such

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depot." Why the provision that an employe shall walk in front of every backing train for at least three hundred feet before it approaches the depot, if the company would only be liable for injuries occurring within fifty feet of the depot? What meaning can be given to that clause other than that this requirement is placed upon railroad companies because of the fact, known of all men, that persons called, perhaps by business, on the railroad yards and grounds surrounding passenger depots, are often exposed to danger from switching trains, and this regulation was devised for their protection? It is well known that some of the coaches transported in the long trains of the present day must of necessity stop for passengers to embark and disembark in places more than fifty feet from a passenger depot, and yet in close, if not dangerous, proximity to other trains; that the numerous and varied needs of modern railroad travel and traffic require many people in the ordinary course of their legitimate vocations to visit the crowded premises of the railroad companies near, but more than fifty feet from, their passenger depots, amid such surroundings that eternal vigilance is the price of safety. The construction contended for by appellee would deprive all such persons of the benefit of the rule which was designed to protect them. In our judgment, such a construction would contradict the plain terms of the statute, would do violence to the manifest legislative intent, and would render the law ineffective, and to a great degree inoperative. The regulation is a wise one, intended to preserve and protect human life and limb, and should be given full scope, in accordance with its plain meaning, not restricted by strained interpretation.

After careful consideration we are of the opinion that sec. 3549 was intended for the protection of all persons injured within three hundred feet of a passenger depot, where the injury was caused by a backing train, part of a train, or engine, on a track which passes into or along a passenger depot within fifty feet thereof, and was designed to discourage the

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Statement of the case.

reckless practice of backing trains without warning on premises generally frequented by numerous persons, by imposing liability on railroad companies for all infractions of the rule thereby established, and allowing all persons injured to recover full damages without reference to mere contributory negligence. No other construction, in our judgment, will effectually harmonize the several provisions of this section.

Affirmed.

GULF & CHICAGO RAILROAD COMPANY *v.* ARABELLA B. SNEED.

1. RAILROADS. *Highway crossing. Code* 1892, § 3555. *Grades.*

Under Code 1892, § 3555, requiring a railroad company, where its track crosses a highway, to make a convenient crossing and keep it in good order, the grade in the highway required depends upon the extent to which the railroad track is above or below the natural surface of the ground.

2. SAME. *Injuries to traveler.*

Under said section a railroad company is not liable for an injury to a traveler resulting from a defect in the highway beyond the crossing, although the highway where defective be on its right of way.

3. SAME. *Proximate and remote cause.*

Where a horse becomes frightened at an object lying in the highway, and the driver, in undertaking to force the animal past the object, causes it to back the vehicle into a gully at the side of the highway, thereby injuring the occupants of the vehicle, the condition of the highway is not the proximate cause of the injury.

FROM the circuit court of Pontotoc county.

HON. EUGENE O. SYKES, Judge.

Mrs. Sneed, the appellee, was plaintiff, and the railroad company, appellant, defendant in the court below. From a

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Brief for appellant.

judgment for $750 in plaintiff's favor the defendant appealed to the supreme court. The facts are stated and the code section involved quoted in the opinion of the court.

John W. T. Falkner, Fontaine & Fontaine, and *Mayes & Longstreet,* for appellant.

The court will observe that the point at which the mishap, of which the plaintiff below complains occurred, was on the public road fifty-five measured feet south of the point where the railroad crosses the public road. The public road at this point was neither a part of the railroad crossing nor a part of the approach to such crossing, which, under § 3555, Code 1892, the railroad company was under obligation to maintain in safe condition.

To illustrate this, we will suppose that the public road, ditch, and railroad should be just as they are, but that as a matter of fact no railroad crossing was at Morphis Crossing, or near that point, and that the public road, after it reached the level at the top of the hill, bore away from the railroad to the east, never crossing it. Could a recovery be had then, because Sneed's horse frightened at a bush in the public road, and, rebelling against the whipping its master gave it, backed them off the public road into a ditch?

It will be apparent to the court, in the next place, that the mishap which occurred was due to the negligence and careless and ill-considered conduct on the part of Mr. and Mrs. Sneed. It will be remembered by the court that after the parties had safely crossed the railroad crossing, and had gone some distance from it down the road, the horse they were driving took fright at a bush in the public road, refused to pass it, and stopped short. Thereupon Mr. Sneed attempted to force the mare on and over the object by whipping her with the lines. The mare, ordinarily gentle, but now thoroughly frightened, refused to be forced by the object of terror, and

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Brief for appellee.

began to back, backing the buggy and its occupants into the ditch.

The instructions granted to plaintiff are erroneous, because all of them assume as a fact that the place at which the accident occurred was a part of the crossing.

In some aspects the case at bar presents an instance of pure accident, for which the railroad company was in no wise responsible. The case, in many of its features, falls within the rule very clearly stated, 21 Am. & Eng. Ency. Law [2d ed.], 497, which is supported by many authorities from the states of Delaware, Indiana, Illinois, Iowa, Massachusetts, Arkansas, California, Louisiana, Missouri, New Hampshire, Ohio, Pennsylvania, and Texas. The rule is stated in the text as follows:

"According to the view of some cases, any occurrence which the defendant did not cause and over which he had no control, and which he could not have anticipated, is an inevitable accident as to a defendant charged with negligence, while others use the term *omena,* or as practically synonymous with 'act of God.' In whichever sense the term is employed, the rule is believed to be general that where the defendant's act or omission caused injury only by the concurrence of an inevitable accident, which could not have been foreseen, he is not liable."

Mitchell & Fletcher, for appellee.

When a railroad company crosses a highway, it must erect whatever structures are necessary to the convenience and safety of the crossing. Such duty is a continuing one without any express statutory requirement. 3 Rapalje & Mack's Digest, 428 (19); 4 Rapalje & Mack's Digest, 380 (7).

For a full discussion of this question, see 15 Am. & Eng. Ency. Law [2d ed.], 455, *et seq.* We cite the court's attention to a case decided in Michigan, where there is a statute quite similar to ours, a statute which requires the road to be kept in a good and safe condition without specific mention of barriers or guard rails, and in which the court held that it was for the

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Brief for appellee.

jury to say whether safeguards were necessary. *Malloy* v. *Township of Walker,* 6 L. R. A., 695, and the copious collection of cases in the notes.

Again, where there was established a narrow road from ten to twelve feet wide, along a hillside, upon the lower side of which there was an almost perpendicular declivity of some nine feet and a steep slope from there on, the question of negligence of the township in failing to provide a barrier is for the jury. *Wilson* v. *O'Harra Twp.,* 14 Pa. Sup. Ct., 258; *Sharp* v. *Evergreen Twp.,* 67 Mich., 443; *Hinckley* v. *Somerset,* 145 Mass., 326; *Plymouth Twp.* v. *Graver,* 125 Pa., 24; *Olsen* v. *Chippewa Falls,* 71 Wis., 558; *Maxim* v. *Champion,* 50 Hun., 88; *Byerly* v. *Anamosa,* 79 Iowa, 204; *Schuenke* v. *Pine River,* 84 Wis., 669; *Lane* v. *Hancock,* 67 Hun., 623; *Glaub* v. *Goshen,* 7 Kulp, 292; *Wood* v. *Gilboa,* 76 Hun., 175; *Murphysboro* v. *Woolsey,* 47 Ill. (App., 447); *Merriam* v. *Philipsburg,* 158 Pa., 78; *Burns* v. *Yonkers,* 83 Hun., 211; *Wellman* v. *Susquehanna Depot,* 167 Pa., 239.

The plea of contributory negligence in this case depends entirely for support upon the fact that when the horse of appellee's husband hesitated at sight of the bush in the road, the driver urged the animal to go forward and struck it gently with the lines to urge it on. There is no conflict in the testimony that the horse was a reasonably safe and gentle animal, whatever may be the assertion in the special plea. The only witness upon this point is A. B. Sneed, and his testimony is clear. Now aside from the fact that the negligence of appellee's husband could not be attributed to appellee, there can be no contributory negligence on the part of anybody. It was clearly the duty of the driver to pass on and over the obstacle. As he says, there was no room to pass around it, and certainly no room to turn around. He could not have possibly anticipated the unfortunate decision of the horse to back, its former gentleness having given him no warning of such a disposition on its part. The means he used were mild and prudent

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Opinion of the court.

ones. He neither whipped nor jerked the horse, merely urged it forward with the lines. No other course was open to him, and his conduct not even hints at negligence. But even if he erred in judgment in the face of a perilous crisis, he would be excused. *Goodrich* v. *N. Y. Cent. & H. R. R. Co.*, 26 N. Y. St. Rep., 767; *Harris* v. *Clinton Twp.*, 64 Mich., 447; *Hawkins* v. *Johnson*, 105 Ind., 29; *Ladd* v. *Foster*, 31 Fed. Rep., 827; *Lawrence* v. *Green*, 70 Cal., 417; *L. N. A. & Chi. R. Co.* v. *Lucas et al.*, 6 L. R. A., 193.

TRULY, J., delivered the opinion of the court.

Appellee, in company with her husband, driving on a public highway in a buggy drawn by a single horse, crossed the railroad track of appellant where it maintained a crossing over the highway. A short distance beyond the railroad track, which at this place traversed the highway on the crest of a small hill, the highway, in the direction in which appellee was traveling, turned to the right and ran down a declivity for an indefinitely stated distance, approximately parallel with and near to the railroad track. At the place of the injury complained of, some fifty-five feet from the point where the highway crossed the roadbed, but, on account of the curve in the highway, only a few feet from the roadbed, the highway ran near the foot of the railroad embankment, while on the other side there had been washed by the action of the water a gully, variously estimated as being from ten to twenty feet in depth. The story of the accident, as told in the language of Mr. Sneed, the husband of appellee, who was driving the buggy, is as follows: "I was driving along as usual, just driving off the railroad, and just in a few feet below my horse saw a bush lying in the road, and my mare scared at that and would not go on, and I undertook to make her go on, and she backed back and threw us in the gully." From this accident appellee suffered several severe contusions, and for this brought suit, averring that the accident was caused by the negligence of the appellant

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Opinion of the court.

in not complying with § 3555, Code 1892, and that this failure on the part of appellant was the proximate cause of the injury which she suffered. From a judgment in her favor the railroad company appeals.

Sec. 3555, so far as pertains to this question, is as follows: "Where a railroad is constructed so as to cross a highway, and it be necessary to raise or lower the highway, it shall be the duty of the railroad company to make proper and easy grades in the highway so that the railroad may be conveniently crossed, and to keep such crossing in good order." The wording of this section explicitly states the duty imposed upon railroad companies crossing public highways in this state. That duty is as follows: In order that public travel may not be interfered with, nor the rights and privileges of the public in any wise curtailed, the railroad company is required to make such necessary and easy grades as will permit safe and convenient passage over its roadbed. The grade required depends, of course, upon the extent to which it has been found necessary to raise or lower the natural surface of the ground to make the crossing accord with the established grade of the railroad. Whether such grades are to be slight or great varies at each crossing with the natural obstacles which may be presented by the particular location. It is further the duty of the railroad company to see that the crossing is in such condition that the highway can be safely and conveniently used by the traveling public generally. This is the extent of the duty imposed upon railroad companies by the statute under review. The reason of the statute, the object which the legislature had in view, was evidently this: As railroad companies must necessarily, in constructing their lines, traverse numerous public highways, and as they have the power, in order to facilitate their operation, to arbitrarily establish such grade as the topography of the country traversed by their railway may demand, and as this grade can be raised or lowered at the pleasure of the railroad company without consultation with the public or the road over-

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seer, it was decided, and wisely so, that the railroad companies should themselves bear the burden of making such changes in the highway, where traversed, as might be found necessary, so that the rights of the public in the use of the highway, as such, should not be interfered with or infringed upon. Railroad companies are not required to construct or to maintain the public highways of the county, other than where interfered with by the construction of their roadbeds, and to perform the grading required for a convenient approach to such crossing. In the instant case, under the undisputed testimony in this record, appellee received her injury, not on the crossing, nor by reason of the condition of the crossing, nor on any grade constructed by appellant, but after the railroad had been safely passed and the buggy was again traveling over the public highway, the duty to maintain which is by statute placed upon the road overseer and hands, and under the supervision of the board of supervisors. For this reason the instructions for appellee were erroneous, in that they assumed as a matter of fact that the injury occurred upon that portion of the highway which it was the duty of the appellant to maintain in good order.

Nor, under the circumstances of this case, would appellee be entitled to recover, even though the accident had occurred on what might properly be considered as a part of the railroad crossing. The portion of the road at which the accident occurred was reasonably safe for the passage of the traveling public, and the exact spot had in fact already been passed in safety by appellee when the action of her horse, frightened by an object in the road, backed the buggy off the traveled road and into the gully, which was outside of the roadway. Under these circumstances the proximate cause of the injury was not the existence of the gully outside of the traveled roadway. The injury was directly contributed to by the action of the driver in undertaking, situate as he was, with an embankment on the one side of a narrow roadway and a deep gully on the other, to force an obviously frightened animal to

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Syllabus.

pass over the object of her terror. Conceding that the railroad company was under the duty to maintain in good order the highway at the scene of the accident, it was not responsible for the object in the road, nor for the consequent fright of the animal, nor for the negligent act of the driver, and these were the proximate cause of the injury. Under these circumstances, no judgment in favor of appellee could rightfully be sustained.

Reversed and remanded.

HARDIE-TYNES FOUNDRY & MACHINE CO. v. GLEN ALLEN OIL MILL.

1. CONTRACTS. *Written and printed parts. Presumption. Construction.*

It is to be presumed that the parties intended a contract to include all of its words and phrases, and this requires that the written and printed parts of an instrument should be reconciled, if it can be done.

2. SAME. *The application of the rule.*

Where a printed form provides for the delivery of an engine on "—— August, 1902, ——, unless delayed by strikes, fires, or manufacturing contingencies beyond our reasonable control," has added to it a written addendum stating, "It is understood that the above described engine will be shipped August 15, 1902; failing to do so (defendant) agrees to pay as forfeit five dollars per day for each day behind this time," the addendum should be read with the printed form as providing for the damage and exact date of shipment subject to the clause as to strikes, etc., contained in the printed form.

3. SAME. *Penalty. Liquidated damages.*

A stipulation in a contract that in case of a failure to deliver an engine on a certain day defendant would "pay as forfeit five dollars per day for each day behind this time" was intended to provide for liquidated damages and was not designed as a penalty.

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Brief for appellant.

FROM the circuit court of Washington county.

HON. A. MCC. KIMBROUGH, Judge.

The Glen Allen Oil Mill, appellee, was plaintiff in the court below; the Hardie-Tynes Foundry & Machine Co., appellant, was defendant there. Both parties were corporations. From a judgment in plaintiff's favor defendant appealed to the supreme court. The facts are stated in the opinion of the court.

Jayne & Watson, for appellant.

A cardinal rule for the interpretation of contracts is that the intention of the parties must govern. While it is true that the words of the contract are to be considered in determining the intent of the parties, it is also true that the circumstances surrounding the parties at the time are to be considered in interpreting the words used in the contract. The written words, "It is understood that the above described engine will be shipped August 15, 1902, and failing to do so, Hardie-Tynes Foundry & Machine Co. agrees to pay as forfeit $5.00 a day for every day behind this time," were not intended to annul that part of the contract embraced in the first paragraph or clause whereby it is agreed, "That the engine should be shipped in August, 1902, unless delayed by strikes, fires or manufacturing contingencies beyond our reasonable control."

The whole of the contract should be taken together in order to get at the true intention of the provision; and if one part be irreconcilable with another upon any reasonable construction, it ought nevertheless to aid in the consideration of the whole, though apparently inconsistent. 2 Parsons on Contracts [9th ed.], sec. 3, star paging 500 and star paging 491; 10 Pickering, 228.

It is a cardinal rule of the interpretation of mutual contracts, that one part is not to be abrogated or impaired by another when that other has one separate meaning and fully satisfies the words. We do not dispute the rule that where there is

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Brief for appellee.

an irreconcilable conflict in a contract between a written and a printed part, that the writing will govern, but to invoke this rule the court must be satisfied what the intentions of the parties were, and the language must be such as to compel the court to assume that the written part was intended to abrogate the printed part, and the printed part must be irreconcilable with the written part. 1 Beach, Modern Law of Contracts, 728; 99 Penn., 171.

The parties agreed upon the $5.00 per day as a penalty. The court will, where there is doubt, construe a sum payable for breach of contract as a penalty rather than liquidated damages. *Lansing* v. *Dodd,* 45 N. J. L., 525; *Foley* v. *McKegan,* 4 Iowa, 1; 3 Parsons on Contracts [9th ed.], star paging 156, *et seq.;* 91 Ill., 609; 109 Ind., 564.

Percy & Campbell, for appellee.

Where a contract is partly printed and partly written, and the printed part and the written part are in such conflict as not to be reconciled by any reasonable construction, the written part will prevail. 17 Am. & Eng. Ency. Law, 21; *Summers* v. *Hibbard,* 46 Am. St. Rep., 872; *Insurance Co.* v. *Van Os & Shuster,* 63 Miss., 431.

The first clause of the contract in question, which is printed, and the addendum thereto, which is written, present such a conflict.

The amount fixed in the contract to be paid by appellant for each day's delay in the shipment of the engine was properly construed by the court as liquidated damages, and not as a penalty.

It is competent for the parties, in making a contract, to fix therein the amount of damages to be paid upon breach thereof; and where the damages are in their nature indefinite and uncertain, and the parties have mentioned a specific sum as the damages to be paid in case of a breach of the contract, and the same is not greatly disproportioned to any probable estimate of

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Opinion of the court.

the actual damages, the same will be construed as liquidated damages, and not as a penalty.

In considering whether a stipulation to pay a sum of money on a breach of contract is to be treated as a penalty or as liquidated damages, the test appears to be whether the loss which will accrue from an infringement of the contract can or cannot be accurately or reasonably calculated in money, antecedently to the breach. 1 Beach on the Modern Law of Contracts, 624–629; 19 Am. & Eng. Ency. Law, 400–412; 1 Pomeroy's Eq. Jur., secs. 441, 445; *Monmouth Park Assn.* v. *Wallace Iron Works,* 39 Am. St. Rep., 626; 1 Beach on the Modern Law of Contracts, sec. 624, note 6.

CALHOON, J., delivered the opinion of the court.

The declaration of the oil mill claims five dollars per diem as liquidated damages under an alleged contract to pay that sum on failure of appellant to ship a Corliss engine, etc., on August 15, 1902, for every day the shipment was delayed beyond that time. The proposition of the company, accepted by the oil mill May 22, 1902, and thus becoming a contract on its face complete, is on a printed blank, the spaces filled in with writing, and begins thus: "We propose to make and deliver —— F. O. B. —— August —, 1902, ——, unless delayed by strikes, fires or manufacturing contingencies beyond our reasonable control," the engine, etc., describing the subjects of the manufacture. This proposition is signed in print by the company, "by [in writing] James Hunter Smith," and it is accepted in writing by the oil mill, signed "R. V. Garner, chairman; P. L. Mann, president; Charles McGinnis." This contract is followed in typewriting by attached specifications of the work to be done, more elaborate than appear in the accepted proposition. At the end of these are typewritten specifications, which are also in the shape of a proposition, and which provide that the oil mill should prepare the foundation, and that the company should furnish a mechanic to erect, if desired, at

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certain wages, etc., and they conclude thus, in typewriting: "Price and terms to be in accordance with our printed contract herewith attached and made a part of these specifications. Respectfully submitted, Hardie-Tynes Foundry & Machine Co." Immediately under this we find, in manuscript, this, "It is understood that the above described engine will be shipped August 15, 1902; failing to do so, Hardie-Tynes Foundry & Machine Co. agrees to pay as forfeit five dollars per day for every day behind this time," and this addendum is signed "Jas. Hunter Smith." To the declaration a notice under the general issue was filed, setting up the defenses that the delay in shipment was occasioned by strikes, and that no damage was caused by the delay because the oil mill was not in condition to use it because of unpreparedness with necessary things for its erection and operation, until after it actually arrived on the ground. The court refused to permit the company to prove these defenses, and gave a peremptory instruction to the jury to find for the plaintiff, and thus two questions are evolved for our consideration—viz.: (1) Is the manuscript addition at the foot of the signed typewritten proposition independent of and uncontrolled by the reservation as to strikes, etc., in the proposition first signed and accepted? (2) Is the agreement in the manuscript addition, "to pay as forfeit five dollars per day," an agreement for liquidated damages, or for a penalty as a limit to protect against losses actually caused by the delay?

We answer the first question in the negative. The rule is universal that, "if the written and printed matter can possibly be reconciled, this will be done, it being presumed that the instrument contains no clauses not intended by the parties." 17 Am. & Eng. Ency. Law, 21. Here the original paper was to ship "—— August —, 1902, ——, unless delayed by strikes," etc., and the written addendum simply fixes a date in August, and provides for damages per diem for delay in shipment; and we think it should be read as providing for the damages in

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Statement of the case.

addition to the first proposed contract, and for the exact day of shipment, all subject to the clause "unless delayed by strikes," etc.

In answer to the second question, we think the "five dollars per day" means liquidated damages, and was not designed as a penalty, notwithstanding the words "to pay as forfeit." 3 Parsons on Contracts, 157, *et seq.;* 1 Sutherland on Damages, sec. 283, p. 716. In the latter author is found a very elaborate consideration of the shades of adjudication on the question. The decisions are numerous and various in views, and we will not protract this opinion in their discussion.

Reversed and remanded.

DOTTS IVY v. STATE OF MISSISSIPPI.

1. CRIMINAL LAW. *Murder. Instruction. Code* 1892, § 1149.

An instruction purporting to define murder under the statute, Code 1892, § 1149, which excludes the statutory words "without authority of law," is erroneous.

2. SAME. *Evidence. Witness. Woman. Bastard.*

On the trial of a murder case it is competent for the state to show that a female witness for defendant is his mistress; but the paternity of her children by other men is incompetent.

3. SAME. *Self-incrimination. Advice.*

If a female witness be asked in a murder case who is the father of her illegitimate child, she should, where her answer might subject her to a criminal prosecution, be advised by the court of her right to decline to answer the question.

FROM the circuit court of, first district, Chickasaw county.

HON. EUGENE O. SYKES, Judge.

Ivy, the appellant, and others were jointly indicted for the

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Brief for appellant.

murder of one William McQuiston. Upon a severance appellant was separately tried, convicted and sentenced to be hanged, from which conviction and sentence he appealed to the supreme court. The opinion of the court contains a sufficient statement of the facts to insure a comprehension of the question decided.

The first instruction given for the state, mentioned in the opinion of the court, is as follows: "The court instructs the jury that murder is the killing of a human being with the deliberate design to effect the death of the person killed, and if the jury believe from all the evidence in the case, beyond a reasonable doubt, that the defendant, Dotts Ivy, so killed the deceased, then the jury will find the defendant guilty as charged."

A. T. Stovall, for appellant.

The court erred in permitting the district attorney to prove, or attempt to prove, that Becky Deering, a material witness for defendant, was the mother of children born out of wedlock. *McMasters* v. *State,* 81 Miss., 376.

To use the language of this court in the case cited this "was too heavy a load to put on a defendant before an average jury on so grave a trial," and besides that was an immaterial and irrelevant matter to the issue involved. *State* v. *Glinn,* 31 L. R. A., 298; *People* v. *Un Dong,* 106 Cal., 83.

The definition of murder in the code, sec. 1149, says, "The killing of a human being without authority of law, by any means, or in any manner, shall be murder in the following cases: When done with the deliberate design to effect the death of the person killed, or of any human being;" and in this case the purpose of the district attorney was of course to define murder as the statute defines it, but he left out a very material part of the definition, for not every killing with a deliberate design to effect the death of the person killed, is murder. It must be done without authority of law. *Strickland* v. *State,* 81 Miss., 135.

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Brief for appellee.

William Williams, attorney-general, and *Gilleylen & Leftwich,* for appellee.

The evidence offered by the state and admitted by the court touching the relation of Becky Deering and defendant Dotts Ivy was competent. The witness, Becky Deering, was an inmate of the house of defendant and a material witness in his behalf, we might say the most material. She swore to facts affirmatively going to his exculpation and contradicted much of the state's evidence.

The bias, animus, or partiality of Becky Deering became a matter of direct inquiry by the court. It was in no sense collateral or immaterial. Becky Deering was first asked if Dotts Ivy was not the father of her children born out of wedlock since she had been living with him. She made no objection to the question on the ground that it tended to subject her to a criminal prosecution, and denied that improper relations existed. She swore that she had borne four children in the ten years she had lived with defendant.

The material matter here in dispute was the partiality of Becky Deering for the defendant. If he was the father of her children, then it became important for the jury to know it in determining to what extent she should be believed. It was directly material. In assumpsit on a promissory note the execution of which was disputed, it was held material to the issue, to inquire of the subscribing witness, she being a servant of the plaintiff, whether she was not his kept mistress. 1 Gr. Ev., sec. 450; *Martin* v. *State,* 28 South., 92.

Not only can a witness be questioned on cross-examination as to matters showing his motives, interest, or animus, but he can be contradicted as to such matters. 1 Gr. Ev., sec. 450; *Long* v. *Lapkin,* 9 Cush., 361; *Com.* v. *Byron,* 14 Gray, 31; *Titus* v. *Ash,* 4 Fost. (N. H.), 319; *Martin* v. *Farnham,* 5 Fost. (N. H.), 195; *Drew* v. *Wood,* 6 Fost. (N. H.), 363; *Atwood* v. *Welton,* 7 Conn., 66; *Newton* v. *Harris,* 6 N. Y., 345.

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Opinion of the court.

As to the first instruction for the state complained of, it is sufficient to say that the action of the court in granting this instruction was not made a ground of the motion for a new trial and cannot be considered here. Besides, the law attempted to be given by it is fully stated in the instructions for the defense.

Argued orally by *A. T. Stovall,* for appellant, and by *William Williams,* attorney-general, for appellee.

WHITFIELD, C. J., delivered the opinion of the court.

When Becky Deering was recalled, the district attorney was allowed to ask her, over the objection of counsel for defendant, how many children she had in all (not simply how many she had by defendant), and their ages, and who was the father of her children—all of them. The court had first excluded this testimony, but unfortunately let it in later. So, also, the state was allowed to ask the witness Julia Gladney what the children of Becky Deering (all of them) called defendant, to which she answered, "Pappy;" and the state was further allowed to ask Mary Chandler, "Whose children are those of Becky Deering?"—all of them. Several observations are to be made with reference to this testimony. It was not pretended that more than four of the seven children were the children of defendant. Yet the inquiry was allowed to take the wide range of showing who the fathers of all the children were, one of whom was twenty-one years old. She had only worked for the defendant ten years. Again, the witness Becky Deering was not instructed as to her right to decline to answer questions which might incriminate herself, as the better practice requires. And yet undoubtedly her answer might have subjected her to criminal prosecution. It is sound law, doubtless, that a witness may be shown, by proper testimony, to be the mistress of a defendant, since that would go to her credit as a witness when the defendant was on trial. But no such un-

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Syllabus.

limited range of inquiry as the record here discloses can justly be allowed. It goes far beyond showing Becky Deering's interest in the defendant's acquittal. It sought to uncover her whole past life, as to the paternity of all her children; and she herself was made to answer, over objection, questions as to her right to decline to answer which she was not instructed.

The first instruction for the state ought to have contained the words "without authority of law," since it was manifestly drawn under the statute.

Reversed and remanded.

CITY OF CANTON v. CANTON COTTON WAREHOUSE COMPANY ET AL.

1. CORPORATIONS. *Contracts. Municipalities. Police power. Evasion of.*
   Where a warehouse company contracted to furnish a railroad company water through conduits, but was without power to construct and maintain the same across the streets of the city in which the water was to be delivered, a subsequent agreement by which the railroad company, having such power, undertook to construct them, is not an illegal evasion of the police power of the city.

2. RAILROADS. *Lease. Laws* 1882, *p.* 1023, *sec.* 3. *Illinois Central Railroad Company.*
   The lease, executed under Laws 1882, p. 1023, sec. 3, authorizing the Illinois Central Railroad Company, a foreign corporation, to lease the Chicago, St. Louis & New Orleans Railroad Company and other domestic railroad companies, invested the lessee, the foreign company, with all the power and franchises of the lessor companies.

3 SAME. *Public road or way. Streets.*
   A railroad company having power, granted by the legislature, to cross any "public road or way" has the right to cross streets as well as country roads.

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Brief for appellant.

4. MUNICIPALITIES. *Legislative power over. Streets.*

The legislature may divest a municipality of control over its streets and authorize their use by a corporation without compensating the municipality.

5. SAME. *Railroads. Conduits across streets. Right of way.*

A railroad company having the right to do all acts incidental to the maintenance of its railroad, may lay conduits under the surface of its right of way to conduct water to its buildings, although in so doing the conduits pass under the streets of a municipality.

6. SAME. *Eminent domain. Foreign corporation.*

A foreign railroad corporation, having the right to do all acts incidental to the maintenance of its railroad, will not be denied the right to lay conduits under its right of way across streets, because it has no right to exercise the power of eminent domain.

7. SAME. *Temporary obstruction of street. Nuisance.*

A temporary and partial obstruction of a street by a railroad company in laying conduits across it in its right of way is not a nuisance which can be enjoined.

FROM the chancery court of Madison county.

HON. HENRY C. CONN, Chancellor.

The city of Canton, appellant, was complainant in the court below; the Canton Cotton Warehouse Company and the Illinois Central Railroad Company, appellees, were defendants there. From a decree in defendants' favor the complainant appealed to the supreme court. The facts are fully stated in the opinion of the court.

Green & Green, for appellant.

1. The city of Canton by sec. 5, Acts 1836, p. 319, acquired police power by the words "may make all such by-laws for the good government of said towns respectively as they may deem expedient, over the streets in controversy." *Richmond R. Co.* v. *Richmond,* 96 U. S., 521; 9 Rose's Notes, 473; 1 Dillon,

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Brief for appellant.

Mun. Corp., secs. 393-396; *Pittsburg Co.* v. *Hood,* 94 Fed., 621; *State* v. *Inhabitants,* 11 L. R. A., 410.

2. Where country roads become city streets they pass under the jurisdiction of the city. Elliot, Roads and Streets (ed. 1900), sec. 414. "Street, therefore, includes the surface and so much of the depth as may not unfairly be used as streets are used." *Ib.,* sec. 17; 2 Dillon, Mun. Corp., sec. 697.

3. The regulation and control of streets are governmental functions and include practically unlimited power appropriate or incidental to the beneficial use of streets by the public. 2 Dillon, Mun. Corp., sec. 688; Elliot on Roads and Streets, sec. 408.

4. Streets cannot be diverted to private use; express legislation is required to grant their use to a railroad company. *Ib.,* secs. 407, 408, and 801; *Mayor* v. *Bath,* 7 Am. & Eng. R. Cas. (N. J.), 624; 2 Smith's Mod. L. Mun. Corp., secs. 1307, 1309; *Charlottesville* v. *So. Ry. Co.,* 16 Am. & Eng. R. Cas. (N. J.), 604; 3 Elliot on Railroads, secs. 1076, 1081, 1802.

5. A water company has no power to dig in streets except by legislative authority. The laying of pipes in the street is a franchise existent only by legislative grant, or municipal grant under legislative authority. *Wheat* v. *Alexandria,* 88 Va., 742; *State ex rel* v. *Portage Water Co.,* 107 Wis., 441 (61 L. R. A., 77).

6. All franchises granted are subject to municipal police power. 2 Smith, Mod. L. Mun. Corp., sec. 1707.

7. The city is liable for injuries from excavations in streets by whomsoever made. 2 Smith, Mod. L. Mun. Corp., sec. 1310.

8. The Illinois Central Railroad Company is a foreign corporation, operating the railroad across these streets as lessee of the Chicago, St. Louis & New Orleans Railroad Company, a domestic corporation, under a lease for four hundred years, made in 1882.

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Brief for appellant.

(1) No connection is shown between Illinois Central Railroad Company and the charters of the Canton & Jackson Railroad Company and Mississippi Railroad Company, and their charters, and the deed by Fulton, in 1839, to Mississippi Railroad Company of a right of way over his forty-five acre tract of land "to the Livingston Road" do not evidence a grant to the Illinois Central Railroad Company or to its lessor.

(2) If the charter of the Canton & Jackson Railroad Company availed, its calls are *from Jackson to Canton,* which do not mean *through* and *across* Canton. Authority to construct from one point to another carries by implication the right to cross intervening highways (3 Elliot on Railroads, sec. 1101), but not to cross streets in the terminal named. *Ib.,* secs. 1101, 1076, 1081; *N. E. R. R. Co.* v. *Payne,* 8 Rich., 177; *Daly* v. *Georgia R. R. Co.,* 12 Am. St. Rep., 291, 292; *Inhabitants* v. *Conn. R. Co.,* 6 Cush. (Mass.), 63; *Dist. Columbia* v. *B. & O. R. R. Co.,* 114 U. S., 461.

(3) A grant to run through a town is construed most favorably to the public. *St. L. R. R. Co.* v. *Haller,* 82 Ill., 209. And one to occupy a street gives only a right of passage of such width as is necessary for construction and operation of its road. Elliot on Roads and Streets, sec. 801; 2 Dillon, sec. 720.

(4) The public easement in a highway cannot be defeated by adverse or non user. *Domestic Tel. Co.* v. *Newark,* 49 N. J. L., 346; *Ralston* v. *Weston,* 46 W. Va., 550; *Atchison Ry. Co.* v. *Gen. Elec. Ry.,* 112 Fed., 689.

(5) A grant "to operate and maintain the railroad upon Choctaw street" did not confer the right to erect and maintain water stations or hydrants on or in the street. *Chicago Ry. Co.* v. *M. E. Church,* 102 Fed., 89.

9. The averment of the bill that the only right of way acquired over the streets was by acquiesence of the city in the user is not denied by the answer. An easement arising from user can be no broader than the actual use and possession. The

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Brief for appellant.

use for one track would not extend to others. 2 Elliot on Railroads, sec. 401. Nor could the right to lay water mains be implied from acquiescence in the use for tracks.

10. A railroad company cannot acquire title at common law by dedication, as such dedication can be only for public use, and the property of a railroad company, though acquired for public use by eminent domain proceedings, is private property. *So. Ry. Co.* v. *Standifer,* 20 Am. & Eng. R. R. Cas. (N. J.), 154 (s.c., 20 *Ib.,* note, pp. 156, 157).

"Municipalities have no power to grant a franchise for the construction of a railroad on public streets for private use only." *Ib.,* 621. Nor can a right of way for a track for private use be condemned. *Ib.,* 620. See cases *Ib.,* 618-621.

11. The contract was a sale and delivery of water by the warehouse company for profit to the railroad company. The pipes to be laid belonged to the warehouse company, and they were to be laid by the railroad company on its right of way and across the streets so as to be conduits for delivering the water across the streets into the tank of the railroad company. The use of the pipes across the streets was to be by a private corporation for its private business. The railroad company was to exercise its franchise in opening the streets and laying the pipes, and then its functions ceased. The pipes were to be used or operated for delivery of the water across the streets under the franchise of the warehouse company. Having no franchise to lay its own pipes in the streets the warehouse company for interposition acquires substantially the right denied it by the city and the law. The nuisance is continuous. It is a fraud on the police power of the city. At best, it is like the railroad company laying a track across the streets under its franchise to cross the streets for the exclusive private use and profit of the warehouse company, and to be operated by the warehouse company under its franchise. *Hoenig* v. *Chicago Ry. Co.,* 27 Neb., 699, holds: "In other words, that as it cannot perform any of the acts named, therefore it cannot avail

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Brief for appellant.

itself of the services of another corporation to accomplish this result."

12. Whatever may be the franchise of Chicago, St. Louis & New Orleans Railroad Company, the lessor domestic corporation, to lay this pipe, no such franchise exists in Illinois Central Railroad Company under its lease and the constitution of this state.

(1) Being a non-resident corporation it cannot exercise any franchise under the laws of this state, not enjoyed in 1890, without, under constitution, sec. 97, subjecting itself to sec. 179, and becoming a local corporation. The power to be exercised is that of Chicago, St. Louis & New Orleans Railroad Company, under the laws of this state to lay these pipes, and which was not exercised nor sought to be exercised by the lessor corporation, but now for the first time exercised by this foreign corporation. Under sec. 197 a foreign corporation cannot be authorized "to build, operate or lease any railroad in this state;" and no grant of any right or privilege and no exemption from any burden shall be made except upon condition of becoming a local corporation. This section was aimed at the Illinois Central Railroad Company, sec. 190, that the police powers shall not be "so construed as to permit corporations to conduct their business in such manner as to infringe upon . . . the general well-being of the state." The lease does not assign the corporate franchise or that of eminent domain, but only the property and the franchise to take tolls. The lessor continues to be a "going concern," and the $400,000 rent is applied to pay 4 per cent dividends on its stock. Its officers are elected annually, and $5,000 per annum is set apart for salaries and expenses. There is no assignment of after acquired property. The lessor is to pay for all advances for improvements beyond those covenanted for with 5 per cent interest. The lessor is to exercise its franchises upon request in aid of the lease. There is no power granted to exercise the franchise of eminent domain, or to lay new lines of tracks, or

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Brief for appellees.

to create new servitudes on the streets of Canton or elsewhere. Under this lease the lessor domestic corporation must exercise the right of eminent domain or of placing additional servitudes. 23 Am. & Eng. Ency. Law (2d ed.), 784; *Detriche* v. *L. & N. R. R. Co.,* 13 Neb., 361; *Gottschalk* v. *same,* 14 *Ib.,* 389; *Scott* v. *State,* 22 *Ib.,* 628; *Koenig* v. *C. R. & Q. R. Co.,* 27 *Ib.,* 699.

12. Upon refusal of Foot to testify before the master and for the adjudged contempt, under code § 1745, the answers should have been taken off the files. *Walker* v. *Walker,* 82 N. Y., 264; *Peel* v. *Peel,* 50 Ia., 521; *Pickett* v. *Ferguson,* 45 Ark., 191; *Gant* v. *Gant,* 10 Hamp., 465; *Hull* v. *Hull,* 77 Miss., 744. The rule in *Hovey* v. *Elliot,* 167 U. S., 409, is not consonant with our jurisprudence, code §§ 923, 1745, nor with the reason of the punishment for contempt. One who defies the authority of the court should not, while in contempt, be vouchsafed its protection against his own misconduct.

Mayes & Harris, J. M. Dickinson, A. K. Foote, and *J. B. Chrisman,* for appellees.

The bill in this case was for an injunction which restrained the defendants from laying a water main on the right of way of the defendant railroad company. The grievance complained of was, that this main would have to cross Franklin, Fulton, and Peace streets of the city. A map accompanies the answer of the defendants, which discloses the purpose for which the pipe was about to be laid. A connecting pipe was to be laid from the ice factory, which abuts on the railroad right of way, to the main, and one from the water tank of the railroad to the main; the first through the lot owned by the Canton Cotton Warehouse Company, and the latter through the right of way of the railroad company. No proceeding to condemn private property was contemplated, and no infringement of any right is charged, except a purpose to cross said streets at right angles under ground.

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Brief for appellees.

The theory of the complainant seems to be, that the lessor of the railroad company never obtained a right of way into and through the city of Canton.

That the railroad company acquired a right of way (under its lease, through the charter of the New Orleans, Jackson & Great Northern Railroad Company) to the town of Canton, which complainant construes to mean the southern boundary line of the corporation, seems not to be denied. The bill also admits that the Mississippi Central Railroad Company obtained a charter granting a right of way to build from and north of the city of Canton, which complainant construes to mean from the north boundary line of said city; but it is denied that these two companies had any rights under the charters granted them, to unite their lines, and that their consolidation under the act of the legislature, presupposes any such existing conditions; that to accomplish such result required the consent of the city, but its consent has never been given. The existing crossing of its streets by the railroad was a mere license which the city may withdraw. In other words, the contention of the city is that there was a gap in the grant of the right of way to the railroads, leaving the city with paramount authority over its territory and streets, and they cannot now be crossed without its consent.

The proposition that the railroad company has no right of way through the city of Canton, is settled by the original charter granted to the New Orleans, Jackson & Great Northern Railroad Company, approved March 11, 1852, in section 3.

"Sec. 3. Said company is hereby invested with all the rights and powers necessary for the construction, repair and maintenance of railroad through this state, and may purchase such land and material for the same as they may consider necessary," etc.

We refer in this connection, also, to the following acts of the legislature germane to the subject—to wit:

"An act to amend an act granting a right of way through the

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state of Mississippi, and other privileges, to the New Orleans, Jackson & Great Northern Railroad Company. Approved February 28, 1854."

"An act to incorporate the Mississippi Central Railroad Company. Approved March 10, 1852."

"An act to extend the time for the completion of the New Orleans, Jackson & Great Northern Railroad. Approved February 9, 1860."

"An act entitled an act to authorize the consolidation of the New Orleans, Jackson & Great Northern Railroad Company." Acts 1867 and 1873.

"An act to incorporate the Canton & Jackson Railroad Company. February 7, 1841."

"An act to incorporate the Chicago, St. Louis & New Orleans Railroad Company." Acts 1882.

"An act authorizing the lease of the Chicago, St. Louis & New Orleans Railroad to the Illinois Central Railroad Company." March 1, 1882.

The act of 1852, above, is thought to be insufficient by complainant, because it does not name an objective point on the northern boundary of the state, and does not in terms provide for crossing streets and highways. Well, what does it mean? A street is no more sacred than any other highway. Must a grant mention every public road that the railroad has to cross? It cannot go through the state without crossing a great many. "A grant through," etc., such as we have in this charter, is like the grant of Cohea to the Vicksburg & Mississippi Railroad Company before the line was located. In passing on the right of the railroad under this grant, the supreme court says: "The way granted was not fixed by the deed as to place, quantity or direction." It was, until located, a floating right, exercisable over any portion of the land within the limit of the width specified. Action was required by the company to indicate and fix the way granted. The territory of the state of Mississippi, through which the legislature granted the right of way,

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Brief for appellees.

stood to the state in the same relation that Cohea's tract of land stood to him. In neither case had the road at the date of the grant projected the line or selected its way as to place, quantity or direction. Until located it was a floating right, but nevertheless a complete and perfect right, exercisable over any portion of the territory named, and determined and fixed when the road selected the right of way. *V. & M. R. R. Co.* v. *Barrett,* 67 Miss., 579; Jones on Easements, "Unrestricted Grants," sec. 373, *et seq.*

But the legislature did not overlook the fact that the railroad would cross highways and streets. It will hardly be denied that it has the power to abolish as well as to create. Its authority over highways is paramount. Dealing directly with the subject in the charter of the Holly Springs Railroad Company, made a part of the original Mississippi Central Railroad charter, the rights and obligations under which, and to which, the consolidated company (the Chicago, St. Louis & New Orleans Company) succeeded, it said in the eleventh section:

"Whenever in the construction of the said railroad it shall be necessary to cross or intersect any established road or way, it shall be the duty of said president and directors so to construct said railroad across any road already or hereafter to be established by law, so as not to impede the passage or transportation of persons or property thereon; and when it shall be necessary to pass through land of any individual, it shall also be their duty to provide a proper wagon way across said railroad from one part of the land to another."

Independent of a chartered grant, the railroad company has acquired title by prescription. We have shown that it has used and occupied daily, without question, the present right of way for forty years. All the authorities concur that easements may be thus acquired. *Lanier* v. *Booth,* 50 Miss, 410; *Alcorn* v. *Sadler,* 71 Miss., 634; *People* v. *Kerr,* 27 N. Y., 192; 6 N.

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E. Pep., 506; Jones on Easements, 147, *et seq.*, and authorities cited.

And it is no answer to say that the public also have crossed over and through all these years, or that the party claiming the right to use the way should be the only person entitled to enjoy it, provided that the right claimed is exercised independently of others. *McKenzie* v. *Ellis,* 134 Ill., 156; Jones on Easements, 272.

In *Kent* v. *White,* 10 Pick., 138, 142, it is held that different persons may have a right of way over the same place by different titles—one by grant, another by prescription and a third by custom; each may plead his own title, and, if he proves it, it is sufficient, although he may also prove title in another in proving his own, provided the titles are not in conflict.

The second proposition—to wit, that laying this pipe is an additional servitude on the right of way which the railroad cannot impose—may be dismissed with very few words.

The legal title to the streets is not in the city. It only claimed under dedication by another as an easement. For any additional servitude imposed, only the original donor of the easement can complain. The rule that he owns everything under the earth not necessary to the enjoyment of the easement, and that it reverts to him if abandoned, is a rule without exception. *Paley* v. *Chandler,* 6 Mass., 454; *Adams* v. *Emmerson,* 6 Pick., 561; *Allen* v. *Boston,* 159 Mass., 324; *Knox* v. *New York,* 55 Barber, 404; *Jackson* v. *Hathway,* 15 John., 447; *Metropolitan St. Railway* v. *Spencer,* 120 Mo., 154; *Duberger* v. *Malony,* 9 Iowa, 450; Jones on Easements, sec. 208.

So much concerning the complainant's claim that laying the pipe is an additional servitude. It must be clear that if this were true any claim or damage resulting would not inure to the city or justify an injunction on its prayer.

But the laying of the pipe in this case is an incident to the railroad right of way. Water is as much a necessity as coal or

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Opinion of the court.

engines. It is a necessity without which the easement is useless. All authorities concur that there is an implied grant in the grant of the easement of such incidental use as is necessary to its complete enjoyment. *Abbot* v. *Butler,* 59 N. H., 317; *Walker* v. *Pierce,* 38 Vt., 94; *Gunson* v. *Haley,* 100 Pa., 42; *Holt* v. *Sargent,* 15 Gray, 97; *Bartlett* v. *Prescott,* 41 N. H., 317; *Wells* v. *Solman,* 34 N. H., 840.

Argued orally by *Marcellus Green,* for appellant, and *Edward Mayes,* and *J. B. Chrisman,* for appellee.

TRULY, J., delivered the opinion of the court.

The parties to this litigation are (1) the city of Canton, a municipality of this state incorporated by legislative authority in 1836, and by operation of law clothed with "full jurisdiction in the matter of streets," and having power to "regulate the crossing of railways;" (2) the Canton Cotton Warehouse Company, a private corporation operating under a charter authorizing it to manufacture ice and sell water, but possessing no municipal franchise empowering it to lay pipes under the streets of the city; (3) the Illinois Central Railroad Company, a foreign corporation operating and maintaining a railroad through this state from its southern to its northern boundary by virtue of a lease from the Chicago, St. Louis & New Orleans Railroad Company. The city was complainant below, and the other parties defendant, to a bill filed in the chancery court of Madison county.

The facts giving rise to this litigation are these: The railroad operated and maintained by the Illinois Central Railroad Company runs through the city of Canton, traversing its streets with several tracks, and has so run for more than forty years. Canton is a division or relay station on the railroad, where a roundhouse is maintained and where the cars and engines upon its trains are changed. In the ordinary operation of its business at that place, the railroad company consumes from

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100,000 to 150,000 gallons of water daily. To procure the needful supply, it has several wells on its property, but the wells frequently failed, whereupon water was obtained from the municipal waterworks at twenty-five cents per 1,000 gallons by agreement and consent of the city authorities, or the engines were taken to other points where the necessary water could be procured. The result of this was that, if an engine had to be taken elsewhere for water, it entailed considerable inconvenience and delay, while, if the water was obtained from the city, there constantly arose disputes as to the amount consumed. The power house of the Canton Cotton Warehouse Company, where it conducted its business of manufacturing ice, was adjoining the right of way of the railroad, about 1,700 feet north of the roundhouse where the railroad water tanks were maintained. In the prosecution of its business of manufacturing ice, the warehouse company wasted and was compelled to drain off its premises more water each day than was needed by the railroad for the running of its locomotives and other incidental uses. This condition of affairs brought about negotiations between the parties which resulted in a contract being entered into between the warehouse company and the railroad company, as follows: The warehouse company agreed to furnish and lay a four-inch water pipe from its pumping station to the tanks of the railroad company, and to connect with said pipe two first-class meters, to determine the amount of water consumed by the rairoad company; the railroad company agreeing to pay three cents per 1,000 gallons furnished; the contract to last five years from date. Before the pipes were laid according to the terms of this contract, it was discovered that the warehouse company had no franchise empowering it to lay pipes in or across the public streets; and it was further seen that in laying the water main it would be necessary for it to cross two of the public streets of the city—namely, Peace and Fulton streets—across both of which the railroad maintained, and had maintained for many years, its cross-

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ing. Acting upon legal advice, to avoid a conflict with the municipal authorities over the legality of their action, this contract was abandoned, and subsequently another entered into, whereby for the same price per 1,000 gallons, the warehouse company contracted to furnish the water, but the railroad company agreed to furnish and lay the requisite pipe. For purposes of convenience, a six-inch main was substituted for the four-inch as stipulated in the original contract. In pursuance of this contract the railroad company undertook to lay the water main from the pump station of the warehouse company into the right of way of the railroad company, and thence south on said right of way to its own water tanks, when it was prevented by an injunction issued on behalf of the city. The grounds upon which the city prayed for and obtained the issuance of the injunction restraining the prosecution of this work were: (1) That this was a collusive and evasive scheme between the warehouse company and the railroad company, whereby it was sought to evade the police power of the city and afford the warehouse company an opportunity to further its private business by the sale of its water. (2) That the Illinois Central Railroad Company simply owned a leasehold estate in the railroad which it operated, and that it had no right to exercise the right of eminent domain under the terms of its lease, and that the laying of this water main necessitated the exercise of this power, because it constituted the establishment of a new servitude on highways, and it was further said, in this same connection, that the railroad lessor had no right of way through the city of Canton, and its tracks had been laid and were maintained simply by acquiescence on the part of the municipal authorities. (3) That in the prosecution of this work it would be necessary to dig a trench across the public streets mentioned, in order to install the water main, and that the digging of this trench, and the necessary reopening of the trench whenever repairs were needed, would constitute a continuous nuisance, and an unauthorized taking of public prop-

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erty for private purposes, and would inflict irreparable damage to public and city, for which there existed no adequate remedy at law.

To determine the question of whether or not the arrangement between the railroad company and the warehouse company was evasive or collusive, we need only look at the attendant circumstances, in order to ascertain that the contract was based upon strict business principles. Here was one corporation having a product to sell, and another corporation whose needs demanded that product; the one being clothed with power to sell, and the other being vested with power to buy. The record discloses that the contract was to the mutual advantage of the parties. The warehouse company was seeking to dispose of a waste or by-product at an advantage; the railroad company was procuring a needed supply of water, of a better quality, more suitable for its use, more conveniently obtained, and at less cost than it could be otherwise procured. The purpose of the contract was legitimate, and contravened no principle of law or morals. The fact that under its provisions the railroad company procured water cheaper than the municipal authorities would supply the private citizen in no wise affects the legality of the transaction. The railroad officials had the right to buy where they could procure the needed supply of water cheapest, and their action was based on good business principles, and was strictly in accordance with their duty to the stockholders of the company. Both parties to the contract were within their legal rights, and so there was nothing to conceal, and no necessity for collusion or evasion. Nor can any sinister motive be attributed to their action in the abandonment of the original contract, and entering into another by which the railroad company was to furnish and lay the water main. It is manifest that this change in the terms of the contract was due to the fact of the discovery that the warehouse company possessed no municipal franchise vesting it with power to construct water mains across the public streets, but,

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this fact being proven, it nevertheless remains true that the purpose of the contract, the object in view, the end which both parties sought to attain, was strictly legal. The railroad company wanted the water; the warehouse company wanted to sell it. The seller had no authority to lay the delivery pipes. It was thought the buyer had. So the buyer assumed the expense entailed by the construction of the requisite water main. This was not a violation of the law, but a commendable effort to keep within its pale; to prevent friction between the contracting parties, on the one hand, and the municipal authorities, on the other; and to still carry into effect in a perfectly legal way the contract which was for their mutual pecuniary benefit. Assuming the power of the railroad company to lay water mains for its own private purposes on its own right of way, it must be conceded that, if the mains were not intended to cross the public streets, the contract in question would be above suspicion, and the warehouse company could, with the consent of the railroad company, have laid the main along its right of way. The change in the contract was in no sense an attempt to evade the police power of the city. If the Illinois Central Railroad Company had the power to construct and maintain water mains along its right of way and across the public streets, it had like power to contract with others to do the work. And this brings us to the consideration of the material inquiry presented by this record.

Has a railroad company the right to construct water mains along its right of way, and, if so, has it the like power to construct such mains over the public streets of a municipality? But first, and as preliminary to this question in the instant case, the attitude of the Illinois Central Railroad Company must be considered. It is contended by appellant that this company, being a foreign corporation, is not vested with any power to exercise the right of eminent domain in this state, and that the laying of the water main on its right of way is the imposition of an additional servitude, and hence calls for the

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exercise of the power of eminent domain before such main can lawfully be constructed. It is said further that, conceding, as an abstract question, that railroad companies owning their rights of way have the power to construct water mains for the purpose of procuring a needed supply of water, still in the instant case the Illinois Central Railroad Company is not vested with like power, for the reason it is the lessee only of the railroad which it operates, and is only clothed with the power and rights granted by the terms of its lease; and still further it is contended that its lessor never had a legally acquired right of way through the city and across the streets of Canton, and that the construction of its tracks and the subsequent maintenance thereof are solely due to the acquiescence of the citizens and the municipal authorities of said city. The consideration of these contentions requires a proper understanding of the underlying facts, and this renders indispensably necessary a brief examination of the laws to which the presence of the Illinois Central Railroad in this state is to be attributed. The Illinois Central Railroad Company in the year 1882, being first thereunto duly empowered by the legislative authority of the state (Laws 1882, p. 1023, ch. 559), entered into a contract of lease for the term of four hundred years with the Chicago, St. Louis & New Orleans Railroad Company. By virtue of this lease the lessor company leased, granted, and demised unto the Illinois Central Railroad Company its railroad, "extending from the city of New Orleans, in the state of Louisiana, through the states of Louisiana, Mississippi, Tennessee, and Kentucky, to a point on the south bank of the Ohio river," including all rights of way, depot buildings and grounds, and all other property, with the appurtenances thereunto belonging, and containing this further delegation of power: It (the Illinois Central Railroad Company) was expressly granted the power "to have, hold, exercise, and enjoy all the rights, powers, privileges, and franchises which can be lawfully exercised and enjoyed in or about the said railroad and other demised premises, and the manage-

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ment, control, and operation of the same, as fully, amply, and entirely as the same might or could have been held, exercised, or enjoyed by the said party of the first part [the Chicago, St. Louis & New Orleans Railroad Company], had this indenture not been made." This operated as a full and complete investiture in the Illinois Central Railroad Company of all the rights, powers, privileges, and franchises which its lessor held, enjoyed, or possessed. What were those rights, and what property did the lessee enter into possession of under this lease? The Chicago, St. Louis & New Orleans Railroad Company was the result of several preceding consolidations between other and different railroad corporations. Its immediate predecessors were the Central Mississippi Railroad Company and the New Orleans, Jackson & Northern Railroad Company, and by the supplementary act ratifying the consolidation of these two companies into the Chicago, St. Louis & New Orleans Railroad Company, and incorporating the last-named company, the said Chicago, St. Louis & New Orleans Railroad Company was expressly declared to be a corporation of the state of Mississippi, and, as such domestic corporation, was "invested with all the rights, powers, privileges, liberties, and franchises conferred by the act to which this is a supplement, and especially the rights and powers of section 10 of the act to insure the construction and completion of the New Orleans, Jackson & Great Northern Railroad Company through the state of Mississippi, and of section 10 of the act incorporating the Mississippi Central Railroad Company." Referring to the acts of incorporation of the several companies, from the consolidation of which the Chicago, St. Louis & New Orleans Railroad Company resulted, and to which by each successive act of incorporation or consolidation the rights, privileges, and franchises of such companies were expressly granted, we find that the existence of a continuous line of railroad from the southern boundary of the state, thence north through the state, is expressly recognized, and its existence and enjoyment of franchises acquiesced

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in and continued. We find further, as bearing on this question, and showing the privileges, powers, and franchises granted by legislative act of this state, and all of which are expressly kept alive, and finally invested in the Chicago, St. Louis & New Orleans Railroad Company, the following, arranged without reference to chronology:

"An act to authorize the consolidation of the New Orleans, Jackson & Great Northern and the Mississippi Central Railroad Companies, and for other purposes. Approved April 18, 1873 [Laws 1873, p. 567, ch. 295].

"Whereas, the New Orleans, Jackson & Great Northern Railroad Company owns a line of railroad from New Orleans, Louisiana, to Canton, Mississippi, and the line thence northward to Jackson, Tennessee, is owned by the Mississippi Central Railroad Company, but now leased to the Southern Railroad Association, a corporate body existing under the laws of this state, and this line the parties concerned are now rapidly extending to Cairo, Illinois, so that a continuous line of railroad shall be formed from New Orleans to St. Louis, Chicago, and all the railroads leading to the Atlantic seaboard and the Pacific coast, and looking to this end said parties have already entered into a contract with the Illinois Central Railroad Company."

Section 3 of an act entitled "An act granting the right of way through the state of Mississippi, and other privileges, to the New Orleans, Jackson & Great Northern Railroad Company:" "Sec. 3. Be it further enacted, that said company are hereby invested with all rights and powers necessary for the construction, repair and maintenance of said railroad through this state, and may purchase such lands and materials for the same as they may consider necessary; and in case they or their agents cannot agree with any owner or owners of land or other material, upon the terms of purchase, or in case the owner shall be under the age of twenty-one years, or a non-resident of

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the state, *feme covert*, or *non compos mentis*, said company may proceed to obtain title to said lands and materials as in the manner prescribed, and shall be invested with all the powers conferred by the sixth, seventh, and eighth sections of an act to incorporate the Hernando Railroad Company, approved May 13, 1837, so far as the same may be applicable to the construction of a railroad through this state from New Orleans to the line of boundary separating it from the states of Alabama and Tennessee."

Section 2 of an act entitled "An act to incorporate the Canton & Jackson Railroad Company:" "Sec. 2. Be it further enacted, That the president, directors and company shall have power and authority to build and construct said railroad with one or more tracks or railways from Jackson, in Hinds county, to Canton, in Madison county; and they and their agents, engineers or workmen may enter upon and use or excavate or embank any land which may be needed for the site of said railroad, or for the erection of any warehouses, depots, offices, or any other buildings or works necessary or useful in the construction of said road, and may take and use any land, timber, gravel, stone, or other materials necessary for the construction of said road, or its works, or to build, erect and repair bridges, culverts, dams, or other things necessary for the same."

Section 13 of the same act: "Sec. 13. Be it further enacted, That whenever, in the construction of said railroad, it shall become necessary to cross or intersect a public road or highway, it shall be the duty of said president and directors so to construct said road across such public road or highway as not to impede the progress or transportation of persons or property along the same, or when it shall be necessary to pass through the lands of any person it shall also be their duty to provide for such person proper ways to cross said railroad from one part of his land to another."

Section 2 of an act entitled "An act to incorporate the New Orleans & Jackson Railroad Company and for other purposes:"

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"Sec. 2. Be it further enacted, That whenever, in the construction of said road, it shall be necessary to cross or intersect any established road or way, it shall be the duty of the president and directors of said company so to construct said road as not to impede the passage of persons or property along the said highway; and when it shall become necessary to pass through the lands of any individual, it shall be their duty to provide for such individual a proper wagon way across said road from one part of his land to the other; and where said road shall run through the enclosures of individuals, it shall be the duty of said company to dig and keep in repair the necessary stock ditches in order to protect such enclosures."

Section 2 of an act entitled "An act to incorporate the Holly Springs Railroad Company:" "Sec. 2. Be it further enacted, That whenever, in the construction of the said railroad, it shall be necessary to cross or intersect any established road or way, it shall be the duty of the said president and directors so to construct the said railroad across any road already or hereafter to be established by law, as not to impede the passage or transportation of persons or property thereon; and when it shall be necessary to pass through the land of any individual, it shall also be their duty to provide for such individual a proper wagon way across said railroad from one part of his land to another."

By these references it becomes evident that the Chicago, St. Louis & New Orleans Railroad Company was clothed with complete power to do any and all acts which might be necessary to insure the successful maintenance and operation of its line of railroad throughout the state. The object which preceding legislation had in view was the encouragement of various railroad corporations so as to insure the construction of a line of road which should run without break, traversing the entire state, and link together the markets of the north and the fields and factories of the south. This end had already been accomplished at the date of the incorporation of the Chicago, St.

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Louis & New Orleans Railroad Company. The continuous line of railroad was already in successful operation throughout the state, and it was only necessary to clothe the company then coming into existence and obtaining possession of the line with all necessary powers to insure its continued and successful operation. This company, in assuming charge and control of the railroad already constructed, was clothed, as successor, with all the powers, privileges, and franchises with which each and every prior corporation had been by legislative authority invested. We think it absolutely indisputable that the acts referred to, recognizing and acquiescing in the enjoyment of a franchise by a railroad corporation through the state of Mississippi, and through each one of the municipalities mentioned in its charters and traversed by its line, considered in connection with the further fact that a right of way "from Jackson to Canton," and "from Canton northward," and "through the state," was in express terms granted to the corporations named, did do what they undertook to do, and that evidently was to grant and delegate to the Chicago, St. Louis & New Orleans Railroad Company full power to do all acts necessary to the completion of the construction and incidental to the subsequent maintenance of the road, wherever it might, under the terms of its charter, lawfully be laid. *Hazlehurst, Rec.,* v. *Freeman, Trus.,* 52 Ga., 245; *Rio Grande R. R.* v. *Brownsville,* 45 Tex., 88; *M. & E. R. R. Co.* v. *Central R. R. Co.,* 31 N. J. Law, 205, 212; *C. & N. W. Ry. Co.* v. *C. & E. R. R. Co.,* 112 Ill., 589; *Com.* v. *Erie, Etc., R. R. Co.* (Pa.), 67 Am. Dec., 475.

Power, as we have seen, was expressly granted to cross any "public road or way;" and it is now finally and firmly established by the adjudications of our own court and other authorities that these terms refer, unless a contrary intention plainly appears, not only to country highways, but to municipal streets as well. *Hamline* v. *Railway Co.,* 76 Miss., 417 (25 South., 295); Smith, Mun. Corp., sec. 1495; Elliot, Roads and

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Streets, sec. 1, note 3, and cases cited. To hold that a grant of a right of way through a state did not carry with it the power to cross over highways of every description would be to render nugatory every act of incorporation granted to a railroad company. In the very nature of things, it would be impracticable, if not impossible, to specify in each act of incorporation every street and road, to be, or which might be, crossed by the projected railroad; and yet it is a matter of common knowledge that no railroad can possibly traverse a populous state without crossing many thoroughfares, both urban and rural. It was certainly not the intention of the Legislature that the great march of progress in which railroads are so often the leaders could be interfered with or impeded by an arbitrary refusal to grant a right of way by any municipal body. To so hold would have the inevitable effect of compelling railroad companies not to run through the municipalities of the state, but to avoid them. That this was not the legislative design, and is not the true view, but is directly violative of the public policy of our state, is plainly shown by all past legislation on this subject; and by reference to section 187 of our present constitution, where it is made compulsory upon every railroad passing within three miles of any county seat, even when not mentioned in its charter, to pass through the same, and to maintain a depot, provided the town or its citizens will grant a right of way and sufficient depot grounds therein; the object clearly being to prevent property values in an established county seat being injured by the locating of a line of railroad a short distance therefrom; and this is an implied recognition on the part of the framers of our constitution of the great underlying truth that railroads, properly conducted and under reasonable regulations, are a power for good in the upbuilding of the material prosperity of a community.

In this state the power of the legislature over municipal streets is plenary, unless in exceptional cases not here presented.

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It has the power to divest the municipalities of all control over their streets, and authorize their use by corporations without compensation to the municipality. It is a question of legislative will and intent, not a question of power. *City of Meridian* v. *Telegraph Co.*, 72 Miss., 912 (18 South., 84); Dillon, Mun. Corp., secs. 680, 683, 701; Smith, Mun. Corp., sec. 1309.

With this principle clearly in view, looking now to the facts of this case, and bearing in mind the needs of a railroad for its successful operation, the question next arises as to what rights a railroad acquires in its right of way, and, further, whether there is any difference in the extent of these rights where the right of way is over private property, or where it traverses public streets or highways. It should be borne in mind that both railroad corporations and municipal corporations are created solely by legislative authority, and are clothed, in this connection, at least, only with such powers as are expressly granted in the creative act which vitalizes and brings them into existence. By the grant to a railroad of a right of way, whether that grant be made by legislative act over public lands or across public highways, or by condemnation proceedings, donation, or purchase through private property, certain rights in the use of its right of way are acquired by the railroad. It has the right to do all things with its right of way, within the scope of its charter powers, which may be found essential or incidental to its full and complete use for the purpose for which it was acquired. Thus it has been held that as a railroad cannot be successfully constructed or advantageously operated without establishing proper grades, so that trains may be safely and speedily transported over its tracks, the abutting owner has no claim for compensation for any earth that may be removed from the right of way, or for damages by establishing in a proper manner a grade thereon. *R. R. Co.* v. *Brown,* 64 Miss., 482 (1 South., 637); *Cassidy* v. *Old Colony Ry. Co.,* 141 Mass., 174 (5 N. E., 142). It is also settled that as railroad companies cannot discharge the duties

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incumbent upon them as public carriers of freight and passengers, and cannot transport the many trains required by the needs of commerce and travel with safety or security to life or property, without the maintenance of a telegraph system, they have the right to establish a system of wires and posts over their rights of way, and that this is not the imposition of an additional servitude, within the legal meaning of that term, authorizing an abutting owner to claim additional compensation. *American Tel. & Tel. Co.* v. *Pearce,* 71 Md., 541 (18 Atl., 910; 7 L. R. A., 200); *Tel. Co.* v. *Rich*, 19 Kan., 517 (27 Am. Rep., 159); *Taggart* v. *Street Railway Co.,* 16 R. I., 688 (19 Atl., 326; 7 L. R. A., 205); Randolph, Em. Dom., sec. 210. The basic principle here, as in the case of municipal control of highways, is essentially the same. Railroad companies are vested with power to devote the right of way to any purpose within the scope of the original condemnation or acquisition, and for the consequences flowing from such use the original owner is presumed by law to have been fully compensated. They may devote the right of way which they have acquired to any use indispensable to or which will facilitate the fulfillment of the objects of their corporate existence, whether these uses be by grading, constructing of telegraph lines, or other incidental uses requisite for the convenient, safe, and successful conducting of their business and regular running of their trains. Does the use to which the Illinois Central Railroad Company desires to devote its right of way in the instant case fall within the category of incidental uses included within the original condemnation or acquisition, or is it a use foreign to its purpose and outside of its needs? It is hardly necessary to state that as railroad trains are pulled by locomotive engines, and as steam is the propelling power, fuel and water are both absolutely indispensable to their movement. As the power cannot be generated without heat, so water is required in order to bring into existence the required motive energy. If water, then, is necessary, a railroad company

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certainly has the right to purchase it, or procure it in any lawful method most convenient, whether by wells dug on its right of way, or by purchase from others. *Hougan* v. *M. & St. P. Ry. Co.*, 35 Iowa, 558 (14 Am. Rep., 502). This much being proven, it follows to our mind, irresistibly, that it has the power to lay such conduits as are required to bring the water from the source of supply to the place of use. It can hardly be seriously contended that a railroad company clothed with power to grade its right of way and to remove the earth therefrom, to lower or raise at pleasure the surface of the ground, and to dig wells for the purpose of obtaining water, would not likewise have the power to dig thereon a trench and lay pipes for the purpose of conveniently conveying the water needed to supply the motive power. We think it manifest, therefore, that if the water main in question was to be laid solely on that portion of the right of way of the railroad obtained by private conveyance or condemnation of private property, the railroad company would be clearly within its rights in so installing it. And we are unable to see that there is any distinction, based upon any sound legal principle, in the power of a railroad company to make such proper use of its right of way as the needs of its business may demand, whether such right of way is acquired through private property by donation, purchase, or condemnation, or granted by legislative enactment over public property, streets, or highways. If it be necessary for a railroad company to construct a telegraph line, or raise or lower a grade where its right of way runs through private property, the same conditions demand the same treatment when the right of way traverses streets or highways. The broad, fundamental principle is: In the construction or maintenance of its line of road, a railroad company is vested with all such powers as may be requisite for the successful consummation of the object for which it was granted corporate existence. Take the instance of an interurban line of cable railway. Should a charter be granted by the state to such a corporation, which, from the

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very nature of the power by which the cars are run, requires that a trench shall be dug, and a cable laid over its entire route, could it be successfully contended that the grant of a franchise would not carry with it, even without special provision, the power to perform such work and to dig such trenches as would be indispensable for the construction of its line of road? Clearly not; the reason being that the work is a mere incident to the completion of the purpose for which the charter was granted, and upon which the very existence of the corporation would depend. Just as a cable is indispensable for the running of such a road, so is water required to produce the propelling power used by steam railroads. The one is no more necessary to the successful operation of the first than is the latter indispensable to the other. This being so, and the lessor of the Illinois Central Railroad Company being expressly vested with all requisite powers, privileges, and franchises, and these, in turn, by the broad and general provisions of its lease contract, being transferred to the Illinois Central Railroad Company, and the power of the legislature to grant the franchise being unquestioned, we see no escape from the conclusion that such railroad company is strictly within its rights in laying the proposed water main over its right of way, whether the same traverses private property, or crosses the public streets of a municipality, through which, by legislative enactment, its lessor acquired the right to construct and maintain its line of road. Especially where, as in the instant case, the right to so cross the streets was asserted and exercised by the railroad company long prior to any express legislative grant to the municipality of power to "regulate the crossings of railways," and such use has been acquiesced in and tacitly acknowledged by the municipal authorities and the citizens continuously and uninterruptedly for nearly half a century. See Smith, Mun. Corp., sec. 1309e; *Chicago* v. *Union, Etc., Co.*, 164 Ill., 224 (45 N. E., 430; 35 L. R. A., 281). Under these circumstances, the fact that the Illinois Central Railroad Company is a foreign cor-

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poration is of no importance. It is not compelled to resort to the power of eminent domain. It is but exercising a right already acquired by its lessor, and to which it has been expressly subrogated.

We do not here decide whether, under sec. 17 of our constitution, the construction across the streets of such water main would or would not entitle the abutting owners on the streets to recover compensation. That is not the case here. The municipality has no such title to the fee of the streets as entitles it to claim compensation from a railroad company or other corporation which by virtue of a legislative franchise occupies a portion of the public streets for crossing. *Meridian* v. *Tel. Co., supra;* Randolph, Em. Dom., secs. 297–365; *People* v. *Kerr,* 27 N. Y., 188.

We recognize the well-established distinction between cases of longitudinal occupancy of streets and cases where the highways are simply crossed in the construction of the line of railroad, but that distinction, as we understand this record, is not brought into question in this case. The only taking of the streets of the city of Canton is by the crossing by the tracks of the railroad, and this power, in our judgment, was expressly granted to the lessor of the Illinois Central Railroad Company, by any just interpretation of the various legislative acts of incorporation hereinbefore referred to.

The remaining question in the case is of easy solution. It is a well-established principle of equity jurisprudence that any unauthorized occupancy of a street constitutes a nuisance, which can by equity be enjoined or prohibited. But here there is no unauthorized occupancy of the public streets of the city of Canton, and no proof that their free use will be permanently interfered with, or that any irreparable damage will be inflicted, and hence there is no ground for the interposition of the restraining hand of a court of equity. *Faust* v. *Pass. Ry. Co.,* 3 Phila., 166; *Danville, Etc., R. R. Co.* v. *Com.,* 73 Pa., 38. Under the facts of this record, all that is sought by the Illinois

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Central Railroad Company is the temporary and partial obstruction of the streets for the short time required for the laying of the water main. This it has the right to do, and this power is expressly recognized as a general proposition as appertaining to all railroad corporations by § 3555, Code 1892. For all damages proximately resulting from such laying of the water main and the digging of the trench, the railroad company, by express statutory provision, would be responsible. Elliot, Roads and Streets, secs. 809–882.

For these reasons, we are of the opinion that the bill of complaint herein states no proper cause for injunction, and, upon the facts disclosed, the decree of the chancellor dissolving the injunction was correct, and is affirmed.

WHITFIELD, C. J., delivered the following concurring opinion:

The facts in this case necessary to the view I take are these: The Illinois Central Railroad Company, finding a more constant and ready supply of water necessary to the convenient and efficient operation of its railroad as a common carrier, contracted with the Canton Cotton Warehouse Company for such supply. The said railroad company's water station was about 1,700 feet south of the Canton Cotton Warehouse & Ice Factory, and the railroad runs through Canton north and south. The railroad proposed to lay a sub-surface water pipe, within the 100 feet constituting its right of way, from the railroad's water station to a point opposite the ice factory, and from that point to lay pipes on the ice factory's grounds. The channel for the pipes was to be eighteen inches wide by two feet deep. Two of the streets of the city—Peace street and Fulton street—cross the railroad from east to west. Peace street is sixty feet wide, and Fulton street forty feet wide. The Canton Cotton Warehouse Company & Ice Factory and Water Plant is a private corporation. In other words, the waterworks plant does not belong to the city. It was, of course, necessary in

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laying this water pipe to cross Peace and Fulton streets. The city filed this bill enjoining the laying of this pipe on the following grounds: First—That the Illinois Central Railroad Company acquired the right of way, under its lease, through the charter of the New Orleans, Jackson & Great Northern Railroad Company, to the town of Canton (that is to say, to the southern boundary line of the corporation), and that the right of way north from the Canton corporation line was acquired under the charter of the Mississippi Central Railroad Company, which charter provided for a right of way northward from the city of Canton. The contention of the city on this point was that as the right of way under one charter was to the city line on the south, and under the other from the city line north, therefore the railroad had no right of way through the city. There are two answers to this: First—The third section of the charter of the New Orleans, Jackson & Great Northern Railroad Company, approved March 11, 1852, provides: "Sec. 3. Said company is hereby invested with all the rights and powers necessary for the construction, repair and maintenance of railroad through this state, and may purchase such land and material for the same as they may consider necessary." The charter of the Holly Springs Railroad Company, which was made part of the original Mississippi Central Railroad Company charter, which belonged to the consolidated company, the Chicago, St. Louis & New Orleans Company, provides in its eleventh section: "Whenever, in the construction of the said railroad, it shall be necessary to cross or intersect any established road or way, it shall be the duty of said president and directors so to construct said railroad across any road already, or hereafter to be established by law, so as not to impede the passage or transportation of persons or property thereon; and when it shall be necessary to pass through land of any individual, it shall also be their duty to provide a proper wagon way across said railroad from one part of the land to another." The right of way through the state of Mis-

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sissippi, of course, conferred the power to acquire the right of way through the streets of any city in the state along the charter route. We all agree that there is nothing in this contention. The second ground for the bill was that the laying of this pipe under the surface of the streets was an additional servitude, which the railroad company could not impose without the consent of the city; but it is obvious, from the authorities cited in the brief of counsel for appellee, that this, if so, could only be complained of by an abutting owner, and this bill is filed by the city alone. The rights of no abutting owner are involved here. The third ground for the bill was that there was a corrupt agreement between the Canton Cotton Warehouse Company and the railroad to use the railroad's right of way for a private purpose—that is, to enable the Canton Warehouse Company to sell its water in disregard, as alleged, of the police power of the city over its streets. And complaint is made about the rate at which the water is sold. But the chief ground presented in the argument here was that the railroad company could not cross with its right of way these two streets without the consent of the city, nor lay said water pipes within the right of way without said consent. So far as the right of way is concerned, we have already pointed out that the lessor of the Illinois Central Railroad Company was granted the right of way through and across these streets by charter given by the legislature. Having obtained legislative grant, it was unnecessary to get consent from the city, since the legislative power in that respect is paramount. And secondly, if there had been no legislative grant, there had been forty years' occupation and use of the right of way across these streets, and that conferred a valid prescriptive right. *Louisville* v. *Louisville Water Company,* 105 Ky., 754 (49 S. W., 766), cited in the exhaustive note to *Asher* v. *Hutchinson W., L. & P. Co.* (Kan.), 61 L. R. A., 76.

The only real question in this case for decision is this: Did the grant of the right of way, or the acquisition of the right

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of way by forty years' use, confer upon the railroad the right to lay the water pipes set out in the testimony, under the ground forming part of the right of way, where the pipes would run under the streets in question, of the city of Canton? The injunction is based upon the proposition that to permit the railroad to dig up the surface of these two streets crossed transversely by the railroad right of way, so as to lay these pipes underground, beneath the surface of the streets, is an interference with the use of these streets as streets. It is, of course, true that the city of Canton has full power to control its streets and their use by reasonable police regulations. Power of cities in this regard is very large. On the other hand, the railroad company has a right of way over these streets, and the grant of the right of way must carry with it every such use of the incidents of the right of way as will reasonably facilitate the efficient operation of the railroad, which use does not also interfere with the use of the streets by the city as streets for the passage over them by persons riding, driving, or walking, or which does not interfere with their use as streets for other proper purposes, and which use does not also interfere with the property rights of abutting owners. See the authorities collated in note to *Asher* v. *Hutchinson, Etc.*, 61 L. R. A., at pp. 77, 78.

There are some principles which are, of course, plain: First—That the city has the amplest power to control its streets for the good of all its citizens. Second—That the only party who can recover damages of the railroad for putting an additional servitude on these rights of way is the abutting owner. See authorities in brief of counsel for appellee. The city has no right to damages in such case. Third—That the railroad grant of right of way over the streets of the city does not authorize it to interrupt or in any manner interfere with the use of the streets as streets. They may construct any necessary and proper buildings on their right of way. *Gudger* v. *Richmond & Danville R. R. Co.* (N. C.), 43 Am. & Eng. R. R.

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Concurring opinion.

Cas., p. 606, and note. But whether they can lay pipes underneath the surface of streets is not, of course, determined by their right to erect buildings on their right of way, where their right of way does not cross streets. Fourth—But it is also clear that whatever use of the ground beneath the surface of the streets, essential to the efficient operation of the railway, may be fairly included within the grant of the right of way itself, as incident thereto, is a use to which the railroad company has a right. Take the concrete case. What the railroad wants is water. Railroad trains cannot be operated without water. The procurement of water in abundant supply is essential, in the highest degree, to the efficient operation of the railroad. The pipes which are to conduct this water from the property of the Canton Cotton Warehouse to the railroad water tanks are proposed to be put deep beneath the surface of the streets, where the railroad right of way crosses them, and the surface of the streets is to be put back in the same condition in which it is now, so that passage over the streets, as streets, will not be in any manner interfered with. It is true that for the little time required to dig up the surface of the two streets and lay the pipes thereunder—shown to be only a few hours—there would be some slight, temporary, interference with travel over the streets; but it is not this sort of casual, necessary interference which the law means, within the principle which we are discussing. Such casual, necessary interference, in the prosecution of improvements, may often occur in the adjustment of the relative rights of cities and railroads passing over their streets, and are not to be held by the courts as an insuperable barrier to the development of the manifold needs of the complex civilization of a city, when the relative rights of a city and of common carriers traversing its streets are involved. The city owes a duty to the railroad, and the railroad a duty to the city. Each must so use its rights as not needlessly to interfere with the exercise by the other of its rights. The city may and must keep its streets open for travel; but, in doing so, it is not to

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stickle at a slight interference for a few hours with that use, when that interference is necessary to enable the railroad to properly exercise its right, incidental to the right of way, to lay sub-surface pipes for the conveying of so essential a thing as water.

As said in *Clark* v. *Fry* (Ohio), 72 Am. Dec., 591: "The right of the public in the use of a highway is the right of transit to every person who has occasion to use it. This right is, however, subject to such incidental and temporary or partial obstructions as manifest necessity may require. Even the use of a highway for mere transit by one part of the public may, at the time of a multitude upon it, oppose a temporary obstruction to the passage of another part of the public. A company of persons stopping and standing on the pavement of a street, or persons stopping in the street with their wagons or carriages, for mere temporary purposes of business, interpose impediments to the free and uninterrupted transit upon a public highway. The delivery of freight and every variety of goods, fuel, etc., at business and other houses on a street, is a necessary incident to the use of the public highway. And the repair or improvement of streets, and the deposit of the materials for the same, often create obstructions to the uninterrupted transit by the public. So, also, the improvement or building or repair of houses and the construction of sewers and cellar drains on adjacent lots often create necessary temporary impediments upon public highways. These are not invasions of, but simply incidents to, or rather qualifications of, the right of transit, and the limitation upon them is that they must not be unnecessarily and unreasonably interposed or prolonged." See, also, *Kirby* v. *Citizens' Ry. Co.* (Md.), 30 Am. St. Rep., 455.

The railroad undertaking to lay such sub-surface pipes transversely and underneath the surface of streets must exercise great care and skill and great dispatch in doing so, so as to make the interference with the use of the surface of the streets as short and as slight as possible. But to hold that,

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exercising such care, and reducing the interference to the minimum, as shown in this record, it may not use this right at all, which it has as an incident to its right of way, already lawfully acquired, is to place one's self in the city's point of view wholly, and omit to see the correlative right of the railroad. The use of the streets must be preserved, of course, but the preservation of the use of the streets as streets cannot in any reasonable sense be said to be interfered with by the construction of the sub-surface pipes in the manner indicated by the testimony in this record. The principle is thus announced in *Elyton Land Co.* v. *South & N. A. R. Co.* (Ala.), 10 South., 274: "The authorities support the conclusion that a railroad company may make any use of the land acquired by it for use as the right of way for its railroad which directly or indirectly contributes to the safe, economical, and efficient operation of the road, and which does not interfere with the rights of property pertaining to the adjacent lands." And again at page 273 the court says: "It is a matter of common knowledge that the railroad business involves the use not only of cars and tracks, but of buildings and structures of various kinds. It was contemplated that the strip of land in dispute in this case should be used as a right of way in a city. The place was expected to be the scene for the transaction of many phases of the business different from, but incident to, the mere act of carrying persons or things. It was to be the place for receiving, delivering, storing, and transshipping freight. In such places it is frequently necessary for the convenient transaction of a railroad business to have platforms, warehouses, lumber yards, elevators, cattle pens, engine houses, car sheds, depots, repair shops, and other like facilities contiguous to the tracks. The space which is commonly called the 'railroad right of way' is, in populous localities, generally found dotted with structures, other than the tracks, which are necessary or convenient for the transaction of the business of a common carrier; and we think that the erection of such structures is to be regarded as within

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the contemplation of the parties to a contract which stipulates for the use of land in such a locality as a railroad right of way, unless the contrary appears from the terms of the contract. Ordinarily the right of way of a railroad company is its exclusive property, and the company is entitled to its free and unobstructed use. *Memphis & C. R. Co.* v. *Womack,* 84 Ala., 149 (4 South., 618). The company is entitled to an absolute and exclusive possession so far as to secure fully every purpose for which the railroad is made and used. *Tennessee & C. R. Co.* v. *East Alabama R. Co.,* 75 Ala. 524 (51 Am. St. Rep., 475). The question is, what are the uses to which the right of way may be devoted? The Western Railroad Corporation was authorized by its charter to lay out its road, not exceeding five rods wide, through the whole length, and to acquire such strip by condemnation proceedings. In reference to the rights of the company within this area, Shaw, C. J., delivering the opinion of the supreme court of Massachusetts, said: 'To the extent of five rods, it appears to us, the legislature intended that the franchise of this corporation should extend, for any and all purposes incident to the object of its creation. It was contended in argument that their franchise for public purposes extended only to the use of this strip of land as a way, and that if they had occasion for buildings and storehouses, as incident to their operations as carriers of persons and merchandise, they were to be regarded, in their latter capacity, as carrying on a distinct business for their own profit, and therefore that such buildings were not to come under the same franchise. But no such limitation is contained in the act of incorporation, and none such results from the nature of its provisions. The establishment of the rail track and the maintenance of engines and cars for the transportation of persons and goods are all combined together, as one public object to be attained, and the privileges incident to the other. No doubt, in practice, the main use of the strip of land of five rods in width, in the greater part of its extent, will be for sustaining the track for the trains to

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pass over. But such restriction of its use is not found in the act, and therefore, when the corporation have occasion to use any part of such strip of five rods for any of the purposes incident to their creation, it is within their franchise.'" To the same effect, see note to *Gugden* v. *Richmond R.* (N. C.), 43 Am. & Eng. R. R. Cas., 608. See specially, also, *Allen* v. *Boston,* 159 Mass., 335 (34 N. E., 519; 38 Am. St. Rep., 423). And see, also, *Walker* v. *Pierce,* 38 Vt., 97; *Abbott* v. *Butler,* 59 N. H., 317.

There is a marked distinction between the rights to lay pipes for water, gas, and the like, in a country highway, and in the streets of a city. The laying of water mains is not an incident of the use of a country highway. Elliot on Roads and Streets, sec. 404. But even there Judge Elliot says (p. 415): "If the light is for the highway, and it is necessary to make it safe and convenient for free passage, then it is probable that the highway officers would have a right to dig trenches and lay pipes, for we think it must be the law that where it is necessary to secure gas to light the public way, and thereby make it safe, the highway officers may use the way for a pipe line. To make our meaning plain, suppose, for example, there is a dangerous bridge or other place in a rural highway much traveled after night, and that the best and most convenient mode of lighting and making it safe is by conveying gas to it, from a place near by; would not the highway officers have a right to dig trenches and lay pipes in the road for the purpose of lighting the dangerous place, and thus make it safe for passage? To our minds it seems clear that they would have this right." But the laying of pipes for the water or gas is an incident of the use of the streets in a city. Says Judge Elliot in sec. 405: "The streets of a city may be used for laying pipe lines, and this is so although there may be no express statutory provision authorizing the municipality to permit such a use. Where a municipal corporation has power to light its streets or to supply itself with water, it has, as an incidental power, the authority to permit

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the necessary pipe lines to be laid in the public streets. But a gas or water company has no right to dig into the streets of a city without the consent of its officers, except, perhaps, in cases where the charter of the company confers that right. Laying water or gas pipes in a street is not an additional burden entitling the owner of the fee to additional compensation. Reservoirs and cisterns may be dug in city streets. Sewers and drains may be constructed in public streets when required for corporate purposes." Precisely the same doctrine is laid down by Judge Dillon in Dillon on Mun. Corp., vol. 2, sec. 697.

The best statement we have seen of the extent of the right of easement in a city of a street is contained in sec. 407 in Elliot on Roads and Streets: "Some of the courts make a distinction between cases in which the fee is in the municipality and those in which it is in the adjoining owner, but, in our judgment, there is, so far, at least, as respects the subject under immediate discussion, no valid reason for the distinction thus declared to exist. The easement which the municipal corporation acquires is broad enough to authorize the corporate officers to make any legitimate use of the streets which does not impair its character as a public way or interfere with its free and unobstructed use. The owner who dedicates ground for a street creates an easement extensive enough to permit the city to make any legitimate public use of it which does not impair the right of passage or the right of ingress and egress to and from adjoining property. So, when the land is taken under the right of eminent domain, all is taken that is necessary to make the street a public way in all that the term implies. The easement acquired is by no means confined to the right of passage or travel, for it is a matter of common knowledge, and therefore of law, that land acquired for a public easement is subject to all the burdens incident to that easement." To the same effect is 15 Am. & Eng. Ency. Law [2d ed.], 497, sec. 5: "As stated above, the municipality has generally no right to place obstructions of a permanent character on a highway for municipal pur-

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poses, but temporary obstructions may be permitted for such purposes when apparently necessary or desirable; and it has even been held that the municipality may occupy a part of the highway with a water tank or reservoir to hold water for the purpose of sprinkling streets." So much for the extent of the use of the easement of a street. As to the extent to which an abutting owner may use the easement in the street, it is said in the authority just cited, on p. 497, sec. 6: "It is conceded that owners of property abutting on the highway may make certain uses of a part of the highway which are necessary for the proper utilization and enjoyment of the property. These rights of the abutting owner are principally those of leaving building materials and accessories in the highway, and also of leaving therein, for a reasonable time, articles about to be moved from or into a building, and apparatus or vehicles for the purpose of aiding in such removal, and a wagon may be placed on the sidewalk for this purpose. The obstruction by the abutting owner must, however, be of a reasonably necessary character, and it must not unreasonably interfere with the rights of the public to use the highway." The same authority states in note 5 on the same page: "A railroad company improving land adjoining a highway for railroad purposes has the same right as an abutting owner to utilize a part of the highway for the purpose of construction work." The same authority, on p. 500, par. "h," states: "The unauthorized making in or near the highway of an excavation which is calculated to interfere with travel constitutes an obstruction and nuisance, subjecting the maker to liability in damages in case any person is injured thereby, unless it is necessarily made in the improvement of abutting property, in which case it must not be unnecessarily extended or continued, and must be properly guarded to prevent accidents." And on p. 491, par. 14, it states: "While highways are primarily designed for the purpose of travel, and must therefore be kept clear of obstructions, the law justifies obstructions of a partial and temporary char-

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acter, from the necessity of the case, and for the convenience of mankind, when those obstructions occur in the customary or contemplated use of the highway; they being reasonably necessary and not unduly prolonged. As to what is a proper obstruction, as being based on a reasonable and necessary use, it is impossible to lay down any general rule; each case being determinable by the particular circumstances thereof." To the same effect, see *Allen* v. *Boston,* 159 Mass., 335 (34 N. E., 519; 38 Am. St. Rep., 423). In 43 Am. & Eng. R. R. Cas., 576, in a note to *Calcasieu Lumber Co.* v. *Harris* (Tex. Sup.), the supreme court of Kansas is quoted as saying in *Kan. Cent. R. Co.* v. *Allen,* 22 Kan., 285 (31 Am. St. Rep., 190): "An easement merely gives a railroad company a right of way in the land—that is, the right to use the land for its purposes. This includes the right to employ the land taken for the purposes of constructing, maintaining, and operating a railroad thereon. Under this right the company has the free and perfect use of the surface of the land as far as necessary for all its purposes, and the right to use as much above and below the surface as may be needed."

Now, what is the principle underlying the right of the city to lay pipes in the streets for water and gas for the public good, and the right of the abutting owner likewise to make excavations under the streets wherein to lay pipes for sewage or water? Manifestly the principle is that land dedicated for a street is not limited as a highway to the one purpose of passage over its surface by pedestrians, vehicles, street cars, etc., but that the easement of streets is so extensive as to permit any other use by the city or by the abutting owner which does not interfere with the use of the street as a highway for travel. It may be conceded that the primary use of a street is that it may be used for travel over its surface, but that in no way interferes with the sweep of the principle that it may also be used for any other purpose not foreign to its use as a highway which does not materially interfere with such use of it as a

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highway. It is impossible to conjecture at the time of the dedicating of any given street in a city how varied and how numerous may be the other uses referred to, demanded by the complex needs of an advancing civilization in city life. Now, on this same principle, precisely, the railroad in this case is entitled to passage over the surface of the streets, and to any other use—sub-surface or super-surface—of the land embraced in its right of way which contributes essentially to the efficient operation of its road as a carrier of freight and passengers, provided only that such other use does not interfere with the use of the streets as streets.

It is said that the Illinois Central Railroad Company is but the lessee of the railroad which constructs these railroad crossings over the streets of Canton, and authorities are cited announcing the familiar principle that ordinarily in such cases the lessee company cannot exercise the right of eminent domain itself, because it does not belong to it by the lease; but those authorities have no application whatever here, for the very obvious reason that the lessor railroad company acquired the right of way itself in the exercise of the right of eminent domain, and the right of way the lessor railroad acquired, of course, passed, in the full extent it had it when so acquired, to the lessee. The appellee is not claiming the right to exercise the right of eminent domain in laying these pipes. Precisely what it claims—and nothing more—is that the right of way acquired by its lessor, and which passed by the lease to it, embraced, as a necessary incident, the right to lay these pipes. Appellee insists that the lessor railroad company could have laid these pipes, as being necessary to the convenient and efficient operation of its railway, and that by its lease it got that right thus already existing in the lessor. In other words, as said at the outset, the crucial test is, what exactly is embraced, under the facts of this case, in the right of way which the lessor had, and, of course, conveyed to the lessee? Cannot it be fairly said that the laying of these pipes within the right of

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way originally acquired by the lessor materially facilitates and efficiently aids the operation of the railroad company as a freight and passenger carrier? If so, then it was an incident to that right of way. The railroad is interfering in no proper sense with any existing use of these streets. If in time the city should need to put pipes for water or gas or sewage under these same streets at these points, when that time arrives there must be a readjustment to suit the needs of the changed conditions. No such situation is presented by this record.

We have already adverted to the fact that no abutting owner is here complaining upon the ground that a new servitude is being imposed by the railroad company on the right of way. If such abutting owner should complain, and if he should show that the laying of these pipes is the imposition of a new servitude, he, of course, could recover such damages as may be occasioned to him thereby, but that is not our case.

We have paid no attention to the charge of collusion between the railroad and the cotton warehouse, for it must be obvious that, if the railroad had the legal right to lay these pipes, the laying of them could not be rendered illegal because of any collusive agreement between it and the cotton warehouse that the railroad should lay them. What it is legal to do cannot be rendered illegal because of a foolish collusive agreement to do it.

Careful consideration of the case leads us to the conclusion that the action of the learned chancellor is correct, and the decree is affirmed.

CALHOON, J., delivered the following dissenting opinion:

The railroad tracks through the city of Canton and over its streets have been there more than forty years, and there has never been, and is not now, any trouble about a supply of water, of which there is plenty, nor any effort by the Illinois Central Railroad Company, until now, or by any of its predecessors, to excavate the public streets of the city to lay pipes

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in order to get water by purchase from another corporation or individual. Its position here is that it has the state's power, which has no need to say to a city, "By your leave," when it proceeds to dig up its streets and throw ditches at right angles across them. This proposition calls for examination to see whether, as a matter of reason or law, this foreign corporation, organized and existing under the laws of the state of Illinois, does not have to say, "By your leave." Every citizen or domestic corporation has to say it before excavating a public street. A request for such specific power would no doubt be hooted out of any legislature in the Union. No corporation, foreign or domestic, it may be assumed, has ever had the hardihood to ask the grant of such specific power under the circumstances shown in this record. Even grants of rights of necessary surface construction over highways are always, everywhere, most carefully guarded. Code 1892, § § 2931, 2974, 3555. Here the claim is under power implied, not express. No citizen may defy the municipal government in its full police power over its streets—a power necessarily inherent in such governments, and always and everywhere recognized by the courts. Then, clearly, before a foreign or domestic corporation can so act, it must be armed with a very plain legislative grant. Without creation by the people, private corporations are nothing. Without it they are more powerless than the humblest inhabitant. Without it a bacillus is a monarch in comparison The people have said to them: "Your charter from us is your law, and you shall do nothing without our warrant upon a strict construction of the powers we grant." The appellee railroad company must concede all this; must concede that the municipal government, elected by its people, has, subordinately to legislative action, the exclusive police power over its streets; must grant that, for the convenience and safety of citizens, who must go about on foot, on horseback, and in wagons, there can be no more important police power intrusted to the government they elect; must grant that not one of these citizens

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Dissenting opinion.

may lawfully dig up the streets. But they say, "We may, and we will, without saying, 'By your leave,' to the city authorities." And why? "Because," they say, "the power in us to do this is necessarily implied as incidental to express powers given to our remotest predecessor by the state legislature." Curious that a legislature, which is the sovereign people, sitting as lawmakers in a pure democracy, should give you power to dig up streets at your pleasure, without authority from, and in defiance of, the local government which they themselves have armed with exclusive jurisdiction over streets, and without even consulting the authorities. Curious that they should equip you with a *supra* jurisdictional force which the foremost citizen could not exercise without punishment by fine or imprisonment or both. Still more curious that they should design this power to be inferred by implication.

Recognizing the necessity of showing credentials for the very unnecessary proceeding they want to put in operation, they produce two certain sections of charters given their remotest predecessors fifty years ago. One is this: "Sec. 3. Said company is hereby invested with all the rights and powers necessary for the construction, repair, and maintenance of a railroad through this state, and may purchase such land and material for the same as they may consider necessary." This case, in one branch of it, turns on the scope of the word "necessary." How a necessarily incidental power can be deduced from this to dig across three public streets, in defiance of municipal protest, in order to get cheaper water from another corporation, which could not so dig, is beyond my power to take in. No case is produced to support such view. Being doubtful about the sufficiency of this, they produce another section, in these words: "Sec. 2. Whenever in the construction of said railroad it shall be necessary to cross or intersect any established road or way, it shall be the duty of said president and directors so to construct said railroad across any road, already or hereafter to be established by law, so as not to impede the passage

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or transportation of persons or property thereon; and when it shall be necessary to pass through the land of any individual, it shall also be their duty to provide a proper wagon way across said railroad from one part of the land to another." If this means anything, it limits and confines the railroad to surface work over roads, and certainly does not squint at the power to excavate to lay water mains in public streets. By no construction of this charter by any rule known to me, or sanctioned by any known decision, can be deduced an incidental authority to excavate the streets of a city, forty years after construction, for gain. Such a conclusion, to my mind, makes it follow, "as the night the day," that they may dig a cistern in the street, and connect with it by sub-surface pipes. My associates must agree that it does follow that, if Canton were a Chicago or Washington City, the company may dig into and across a dozen asphalt boulevard streets to get not merely water, but cheaper water. In my view, the bare statement of the proposition overthrows it. But this sec. 2 has no bearing whatever on the question here. It relates to construction only and over roads. Neither section, on any right reasoning, can be construed to refer to any power, after construction, to dig into streets, without the police supervision of the city, for water, after forty years of use of the constructed railroad, when the water is not "necessary." Here it is not pretended to be necessary. Sec. 3, *supra,* confers only "rights and powers necessary for the construction, repair, and maintenance of a railroad through this state," etc. "Necessary" means what must be—that is, unavoidable; not merely convenient or advantageous. True, the courts give a somewhat liberal interpretation to the word "necessary" in considering grants of powers, even to corporations, but there is no instance known to me, or adduced, which sustains the claim of the foreign railroad company here. It is not conceivable that the legislature intended to grant by sec. 3 any such power as is here claimed, which power has not been found necessary for nearly fifty years to the "main-

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tenance" of the railroad, and cannot be, and is not now said to be.

Illustrating the settled doctrine of non-extension by implication of the powers of corporations, see *Downing* v. *Mt. Washington,* 40 N. H., 230; *Macon* v. *R. R. Co.,* 7 Ga., 221; *R. R. Co.* v. *Briggs,* 22 N. J. Law, 623; *Perrine* v. *Chesapeake,* 9 How., 184 (13 L. ed., 92); *Ford* v. *Delta Pine Land Co.,* 164 U. S., 662 (17 Sup. Ct., 230; 41 L. ed., 590); Rorer on Railroads, 36; 1 Elliot on Railroads, p. 56; *Ry. Co.* v. *Morris,* 67 Tex., 700 (4 S. W., 156); *State* v. *Beck,* 81 Ind., 500.

But they say here the work can be done in a few hours—that it is such a little thing. However, the principle is very large. They say, too, that by this undermining of three public streets they can get water cheaper than from the city which owns its own water plant. So it seems they want a strained and unnatural construction of their charter, not merely to get water, of which there is a great abundance, but to get it cheaper than private citizens can. They want a lighter burden than the common people have to bear. Was this monstrosity ever contemplated by any legislature of any free people in the world?

The fact disclosed is that the Canton Warehouse Company had contracted itself to do the digging and piping and to furnish water to the Illinois Central Railroad Company. But astute counsel seeing that the former could not dig streets to sell its water, an immediate arrangement was made in reliance on a forced construction of the railroad charter, and as a result we have what, in my opinion, is the first instance in the recorded history of railroads where such an outrage as this record discloses was ever attempted on the government of the free people of any city.

The authorities cited for appellee have, in my judgment, no remote bearing on the question, except that by inference they support my position. Of course the company may dig wells on the right of way, and erect structures and telegraph poles on it, not in streets; but the plain implication is they may

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not do it to impede or obstruct ways of public passage, and the authorities so differentiate. I regard the case in hand, in the principle it involves, as quite grave, and there can be no difference of opinion that a great corporation presents itself in very questionable shape in this record, whether right or wrong on the law.

If we are to consider, as we should (and as my associates must agree that we should), the municipal chapter of the code as of force, or as being a declaration of the public policy of the state, and as a recognition of the common law of all time applicable to the subjects now in hand, then there is another serious feature of this record to be adverted to. In this view, the opinion of the majority of the court, in my judgment, is a judicial repeal of the spirit and letter of important independent clauses of five sections of Code 1892—viz., §§ 2933, 2947, 2948, and 2974. The record shows that these sections were adopted by ordinance of the city long before this litigation arose. Sec. 2947 gives the municipal boards "full jurisdiction in the matter of streets," etc. Sec. 2931 empowers them to "regulate the construction and passage of railways and street railroads through the streets," etc. Sec. 2933 empowers them "to grant to any person or corporation the use of the streets," etc., "to lay gas, water, sewer, or steam pipes, etc., to be used in furnishing . . . any person or corporation with water," etc. Sec. 2948 empowers them to "prescribe the rates for the sale of water." Sec. 2974 empowers them "to regulate the crossing of railways . . . and provide precautions and prescribe rules regulating the same," etc. "Full jurisdiction" means "exclusive jurisdiction," as has been repeatedly held by this court, and so held as to sec. 2947 in the case of *Blocker* v. *State*, 72 Miss., 723 (18 South., 388). As may be gathered from what has been said, I favor the doctrine of strict construction of charters, and I stand opposed to the exercise of doubtful powers. But on the most liberal construction of powers under the charter of the railroad now sought to be exer-

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cised, by a lessee which claims to be a foreign railroad corporation, it seems certain that it cannot exercise them except according to law, and it seems certain that it cannot exercise them in palpable violation of law. Surely it cannot dig through three streets at right angles without calling on the city "to provide precautions" in the work, in the language of § 2974, Code 1892. The city government, with "full jurisdiction" over streets, with exclusive jurisdiction to "regulate the construction and passage of railways through the streets," with exclusive jurisdiction to grant the power to any "person or corporation" to "use the streets to lay water pipes," with exclusive jurisdiction to "prescribe the rates" for the sale of water (Code 1892, § 2948), with exclusive jurisdiction to "provide precautions" in the crossing of streets by railways, is entitled to a decree in this cause. The city must be consulted by "any person or corporation," under Code 1892, § 2933, whether claiming the right under charter or not, before laying water pipes in the street. This is reasonable, and none ought to contend that a charter power may be exercised unreasonably and independently of the prescribed law of supervision as set forth in that section. All those provisions are simply enactments of the common law universally recognized by the authorities and text-books relating to the subject. Franchises are granted by legislatures to their immediate creatures, and cannot be leased to either foreign or domestic corporations except by express authority. In the act authorizing the lease of the Illinois Central Railroad Company (Laws 1882, pp. 1023, 1024, ch. 559, sec. 2) there is absolutely no such authority given as is here claimed. It seems to have been carefully omitted. Under it the "railroad" only may be leased. So well did the great lawyers who represented this foreign corporation understand this that they provided in the very first clause of the four-hundred-years lease itself that the lease was of specified things—viz., "all and singular the railroad of the party of the first part, extending," etc. (describing it), "and also the

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lands, gravel pits, rock quarries, rights of way, depot buildings, and depot grounds, station houses and station grounds, water tanks, machine shops, workshops, stationary engines, machinery and fixtures, engine houses, warehouses, offices, and all other buildings, structures, and improvements of any nature and kind whatsoever." And so well did those lawyers comprehend that they were on a "shaking prairie" that they provided in the second clause of the lease that the Chicago, St. Louis & New Orleans Railroad Company, the immediate lessor, should "maintain its corporate organization and existence by the annual election of directors and officers, and the performance of such other acts as may be required by law for that purpose, and that it will at any time during the said term [four hundred years], when requested by the said party of the second part [the appellee], its successors or assigns, exercise every corporate power, and do every corporate act which the party of the first part [the lessor] can lawfully exercise or do," etc. So there was no authority in law to lease any franchise, and in fact no franchise, but only specified things, appear in the contract of lease; and there can be no warrant for the bald and palpable fraud here attempted by a foreign corporation on our constitution (secs. 179–190) by the attempted exercise of pretended rights in flagrant violation of law, and never sought to be exercised for fifty years by its predecessors or by any other railroad company on earth at any time. In the exercise of these asserted rights, it may, under the decision in this case, as my brethren must admit, at any time, rip up the vitrified brick pavement in the capital city of the state, and lay water pipes under it, to do what? Not to get necessary water, but to get water cheaper than any inhabitant of Jackson can get it. I respectfully repudiate this, and more especially, if further emphasis were needed, when the record unmistakably shows that this foreign corporation relies absolutely on an agreement with a private corporation of this state, the Canton Cotton Warehouse Company, to enable it to do

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Dissenting opinion.

what the warehouse company could not do, and for the execution of which the home company might be dealt with by the city. If illegal in the warehouse company to lay the pipes to furnish the water, the agreement is clearly illegal as to both parties to it. There is no question here of the rights of abutting owners, to which appellees attempt to confine this case. It is a question of governmental police power, which cannot be bargained away and which "shall never be abridged." Const., sec. 190. If any right exists in any railroad corporation, which I deny, to commit the inexcusable outrage attempted here by the Illinois Central Railroad Company, it could be claimed only by its lessor, the Chicago, St. Louis & New Orleans Company, which is not even a party to this litigation. This alone is fatal to the claim of the Illinois Central Railroad Company. 19 Am. & Eng. Ency. Law, 899, and note; *Englewood* v. *R. R.*, 117 Ill., 611 (6 N. E., 684); *Dietrichs* v. *Lincoln, Etc., Co.*, 13 Neb., 361 (13 N. W., 624); *Gottschalk* v. *Lincoln, Etc., Co.*, 14 Neb., 389 (15 N. W., 695); *Kip* v. *N. Y.*, 67 N. Y., 227; 1 Elliot on Railroads, sec. 37; 1 Rorer on Railroads, p. 36. Even "the right to place rails upon a road or street, and use it in the operation of a railroad, can only be granted expressly or by necessary implication, and the use must be reasonable, and such as was clearly contemplated." 3 Elliot on Railroads, sec. 1076, and the authorities it cites in note 1, p. 1613. In *Edmonds* v. *Baltimore, Etc.*, 114 U. S., 461 (5 Sup. Ct., 1100; 29 L. ed., 216), it is said: "It is not known to any member of this court that any railroad company has ever claimed to use the streets of an incorporated city, or any part of them, without express authority from some legislative body." Where is any express authority in this record? Nowhere.

To my mind it is manifest: (1) That the New Orleans, Jackson & Great Northern Railroad Company, if it were now operating this road, could not, under its charter of 1852, containing the clause relied on, do the act sought to be done here.

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Dissenting opinion.

Repeating that clause, it reads as follows: "That said company are hereby invested with all rights and powers necessary for the construction, repair, and maintenance of said railroad through this state." Is it reasonable to suppose that the legislature, in the language used, even if it were used now at this date, had any contemplation of conferring power to undermine the streets of a city? Water mains for the sale of water were unknown here in 1852. (2) If the power exists, it can only be exercised when necessary, and it is not necessary under the facts of this case. If not regarded necessary for fifty years, why is it so now? (3) If necessary now, it is still the exercise of a franchise which cannot be availed of by the lessee, and the lessor is not a party. The act of 1882 does not authorize the lease of any franchise. (4) The warehouse company being without power, the railroad company will not be allowed to combine with it to evade the law.

The questions here are very important, and, while railroad corporations are quite useful, and should be fully protected in their charter rights, still, when they begin gross usurpations, they should be promptly restrained by the strong hand of lawful authority. It is settled law that charters must be construed favorably to the rights of the public, and most strongly against the corporations claiming under them. The authorities seem to be uniform that neither states nor municipalities can strip themselves of their police powers by any contract whatever, because such powers are absolutely essential to the well-being of society, if not the actual existence of the social order. I do not think they should be impaired by a liberal, if not loose, interpretation of the word "necessary" in its collocation in the charter in hand, under the facts disclosed by this record. A fair test is this: If accident and injury occurred because of the trench proposed to be dug, could the city shelter itself from liability in damages under the sections of the charter of the railroad company hereinbefore quoted? Would any court orig-

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Statement of the case.

inally so hold? I think not. If not, it follows irresistibly that this case should be reversed.

It seems to me unnecessary to refer to that line of authorities, clearly sound, holding that parts of the streets may, of necessity, be temporarily obstructed by corporations or individuals with building materials, where structures are being erected on private property or the right of way. The differentiation is too manifest to require pointing out.

The direct violation of the sections of the code referred to is indisputable, in my judgment, and this cannot be argued away, unless on the postulate that a government may contract away its police power, so vital to the people, and that it has in this instance contracted it away through the enactment of a legislature binding on its successors. This position, in reference to police power, is not supported by any precedent.

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BENTON R. ALLEN v. ALLIANCE TRUST COMPANY ET AL.

DEED OF TRUST. *Substituted Trustee. Appointment. Attorney in fact.* The attorney in fact of the beneficiary of a deed of trust cannot appoint a substituted trustee where the deed provides for the appointment "by the beneficiary or any holder of the notes secured or their legal representatives."

FROM the chancery court of Washington county.

HON. CAREY C. MOODY, Chancellor.

Allen, appellant, was complainant in the court below; the Alliance Trust Company and others, appellees, were defendants there. From a decree sustaining defendants' demurrer to a part of the bill, the complainant appealed to the supreme court.

In 1891 Joseph Wilczinski owned a plantation in Washington county, Miss. He borrowed some money from the Alliance

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Statement of the case.

Trust Company, a corporation, and to secure the loan he and his wife executed a deed of trust in the usual form upon the plantation, in which one Currier was made the trustee. The deed of trust conferred upon the trustee the power to advertise and sell the plantation in case default was made in the payment of the borrowed money, and also conferred the power to substitute a trustee in the form which is fully set out in the opinion of the court. In August, 1897, Currier died, and at his death H. C. Williamson was appointed trustee in his place by one Caldwell, attorney in fact of the Alliance Trust Company. Williamson advertised and sold the plantation under the deed of trust, and it was purchased by James Hagget and William McMaster for the benefit of the Alliance Trust Company, and by mesne conveyances the title thus acquired by them became vested in appellant, Allen. Joseph Wilczinski, the grantor in the deed of trust, died before the sale, and left a last will and testament, whereby he devised the plantation to his three sons. This suit was by Allen against the devisees of Joseph Wilczinski to cancel their claims to the land as a cloud upon his title, alleging that the Wilczinski devisees were claiming that the sale under said deed of trust by the substituted trustee, at which complainant purchased the lands, was void. The prayer of the bill was, first, to cancel the titles of the Wilczinski devisees, and to confirm appellant's title, or, failing in that, second, to be subrogated to the rights of the Alliance Trust Company, and to charge said plantation with the amount due and unpaid upon the debt secured by the deed of trust. The defendants demurred to so much of the bill as sought to cancel their title and to confirm complainant's title, and by leave of the court answered the other parts of the bill. The grounds of the demurrer are that the appointment of the substituted trustee by Caldwell as attorney in fact of the Alliance Trust Company was void as being an unauthorized delegation of power conferred by the deed of trust, and consequently that the sale by the substituted trustee was void; that the power conferred by

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Brief for appellant.

the deed of trust upon the Alliance Trust Company, to substitute a trustee in place of the one named, was revoked by the death of Wilczinski, the grantor in the deed, and that the sale was for that reason void.

Jayne & Watson, for appellant.

While the maxim *delegatus non potest delegare* is a well-recognized principle of the law, it gives way to circumstances and conditions which render the delegation of the power necessary. The facts and conditions in the case at bar are such as to cause this maxim of the law to give place to necessity. The mortgagor lived in the state of Mississippi, where the property involved in this suit was situated; the trustee lived in the city of Memphis, in the state of Tennessee; and the mortgagee lived in Edinburgh, Scotland, being a corporation with its domicile in that city, and was engaged in lending money on properties situated in remote parts of the earth. From the power of attorney given by this corporation to Caldwell, it will be seen that the mortgage company was doing business in many states and territories of the United States. Being a corporation it could not, in the nature of things, go to and from the different states and territories in which it did business, and consequently must have acted through its agents and attorneys in fact. Our position ought to be maintained, notwithstanding the usual rule to the effect that a power cannot be delegated by the donee thereof. Sugden on Powers, 213; 4 Cruise's Digest, 225; Perry on Trusts, 294, 511.

It is well settled both in England and America that where the donor of the power authorizes the donee thereof in the instrument of appointment to re-delegate the power, such a re-delegation of the power is good. 2 Jones, Mortgage, sec. 1778; 4 Cruise's Digest, 226, 227; *Clarke* v. *Wilson,* 53 Miss., 119.

The power vested in the donee in the case at bar authorized the *cestui que trust,* "or any holder of said note or notes, or

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their legal representatives," to appoint a trustee in the place and stead of the trustee named in the conveyance.

The American courts, among them our own supreme court, at a very early date placed a liberal construction on the meaning to be given to the term "legal representatives." Say the court in the case of *Cushing* v. *Gibson:*

"The word legal representatives may be considered a generic description, of which we may have many species, such as heirs, aliens, executors, and administrators, administrators *de bonus* and administrators with the will annexed." *Cushing* v. *Gibson,* Walker, 89.

In the case of *Grand Gulf, Etc., Co.* v. *Bryan,* the court held in defining the meaning of the term "legal representatives:"

"In legal parlance the executor or administrator is most commonly called the legal representative. Still, in regard to things real, the heir is also the legal representative, and so is a devisee who takes by purchase. Heirs may be legal representatives or they may not. Suppose by will a testator should give his land to one who is not an heir; the devisee would be the legal representative, in regard to the thing devised." *Grand Gulf R. R. & Banking Company et al. v. Bryan,* 8 Smed. & M., 275.

In *Duncan* v. *Walker,* 2 Dallas, 205, "legal representatives" were held to mean heirs or alienees. It is well settled that the primary and original meaning of the terms "legal representatives," "legal and personal representatives," and "personal representatives" and like expressions, is administrators and executors; "but the terms 'legal representatives,' 'personal representatives,' etc., are often used in statutes and instruments of writing in a broader sense, so as to include all persons who stand in place of and represent the interest of another, either by his act or by operation of law." 18 Am. & Eng. Ency. Law [2d ed.], 814; *Mutual Life Insurance Co.* v. *Armstrong,* 117 U. S., 591; *N. Y. Life Insurance Co.* v. *Flack,* 3 Md., 341; *Plummer* v. *Brown,* 64 Cal., 429; *In re Conrad Estate,* 89

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Brief for appellant.

Iowa, 396; *Walter* v. *Odd Fellows Mutual Benefit Society,* 42 Minn., 204; *Ewing* v. *Shanahan,* 113 Mo., 194 (20 Southwestern Rep., 1065); *Woodruff* v. *Woodruff,* 44 N. J. Eq., 349 (16 Atl., 44); *Bradley* v. *Dells Lumber Co.,* 105 Wis., 246 (81 N. W., 395); *Carpenter* v. *Rannels,* 19 Wall., 138; *Chapman* v. *Nelson,* 31 La., 343; *Beall* v. *Elder,* 34 La., 1099; *May* v. *Greenwich Co.,* 15 Q. B. D., 59; *Hogan* v. *Page,* 2 Wall. (U. S.), 605; *Hammond* v. *Mason & Hamlin Organ Co.,* 92 U. S., 724; *Henderson National Bank* v. *Alvez,* 91 Kv., 142 (15 S. W., 132); *Osborne* v. *First National Bank of Athens,* 175 Pa., 494 (34 Atlantic, 858); *Railway Co.* v. *Fitler,* 60 Pa., 124; *Boston Marine Insurance Co.* v. *Scales,* 101 Tenn., 629 (89 S. W., 743); *Metzger* v. *Manchester Ins Co.,* 102 Mich., 334 (63 N. W., 650).

There is a necessity for trusting persons who cannot be personally known, in order to effectuate men's intentions in the exercise of that dominion which the law gives them over their properties. 1 Sugden on Powers, 148; *Walter* v. *Maund,* 19 Ves. Jun., 323; 1 Sugden on Powers, 151.

Harris & Powell, and *Edward Mayes,* on same side.

We recognize as a general rule the doctrine of *delegatus non potest delegare,* and we are familiar of course with the decision by this court of *Hartley* v. *O'Brien,* 70 Miss., 825, and the cases there cited. Still, we insist that under the facts of this case and the wording of the trust deed in question that the substituted trustee was legally appointed and his acts binding on all parties.

The controlling idea running through all the cases seemingly adverse to our view seems to be that the power to appoint a substituted trustee is a personal trust, and cannot for that reason be delegated. We submit that while this may be true where the donee of the power is a natural person, it has no application where the donee of the power is a corporation. One may repose confidence in the skill or honesty or capacity

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of a natural person, but how can such trust and confidence be reposed in a corporation, which is simply a name and which can act alone through agents, who are constantly changing by death, resignation, or election? If you should say that personal trust and confidence was reposed in the president or directors of the corporation, then in which president or which directors? Holy writ tells us "that man that is born of woman is of few days," and in the seven years that the contract had to run, a part or all of them may or probably would die, be superseded or resign; in fact, Wilczinski did die during that time.

Again, under the provisions of the trust deed in question, the beneficiary or the holder of the notes or their legal representative has power to appoint a substituted trustee. If we understand the law, all the words of an instrument must be upheld and given a meaning, if possible. Under our decisions the legal representative is primarily the executor or administrator, but that sense cannot be applied to the words "legal representative" in this case, for a corporation cannot have an executor or administrator.

This court in the case of *Cushing* v. *Gibson,* Walker's Report, 89, says: "The words 'legal representative' may be considered a generic description out of which we may have many species, such as heirs, aliens, executors, administrators, etc. In the case of *Grand Gulf R. R. Co.* v. *Bryan,* 8 Smed. & M., 276, this court says that the words 'legal representative' mean assignee and grantees, and Justice Sharkey repudiates the idea that it means simply executor or administrator. In 21 Am. & Eng. Ency. Law [1st ed.], we find the following definition of legal representative: 'One who legally or lawfully represents another in any matter or thing of whatsoever nature or character.' "

The attorney in fact, who appointed the substituted trustee, was the legal representative therein mentioned, and that his appointment was fully covered by the powers granted in the

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Brief for appellees.

trust deed. The words "legal representative" cannot be applied alone to the subsequent holder of the notes, who may be a corporation and probably would be, as the finances of the world today are controlled by corporations. And then, too, the plural "their" is used and must refer to the Alliance Trust Company and the subsequent holder of the notes.

Percy & Campbell, for appellees.

It is well settled that the execution of powers is *strictissimi juris,* and that a power to appoint a substituted trustee, conferred upon a beneficiary in a deed of trust, is a personal confidence reposed in him, which cannot be delegated. *Clark* v. *Wilson,* 53 Miss., 119; *Bonner* v. *Lessley,* 61 Miss., 392; *Porter & Macrae* v. *West,* 64 Miss., 548; *Hartley* v. *O Brien,* 70 Miss., 825; *Sharpley* v. *Plant,* 79 Miss., 175.

In *Porter & Macrae* v. *West,* and *Hartley* v. *O'Brien, ubi supra,* this court held that the execution of such a power by an attorney or agent of the beneficiary was void, and, consequently, that the sale made by the trustee, so appointed, did not confer any title.

These authorities are decisive of the case at bar, unless it be that the maxium, *delegatus non potest delegare,* does not apply to a corporation. It may be argued that, as a corporation can only act through an agent, the donor, in conferring a power upon a corporation, must be held to have intended that the power should be executed by it through an agent. It may be true that, where the instrument conferring the power, or the law, as in this state, requires a writing to evidence the appointment under the power, the writing may be executed by an agent of the corporation; but the person to be appointed could be and should be selected and named by the corporation, acting through its directors or managing agents; and, in so far as the selecting and naming of the person to be appointed is conferred upon the agent, it is an unnecessary and unlawful delegation of the power.

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Brief for appellees.

The power in question, being a matter of personal confidence reposed in the Alliance Trust Company, implied that the selecting and naming of the substituted trustee should be made by the corporation, without any expressed requirement to that effect, and as the corporation failed to select and name the substituted trustee, but delegated the duty to an agent under a general power of attorney executed months before the deed of trust conferring the power of substitution was ever executed, the maxim, *delegatus non potest delegare,* should be applied.

Our contention is virtually supported by the case of *Lucas* v. *Mortgage Company,* 72 Miss., 366, to which we specially refer.

Again, it may be argued that, since the power in question was given to the Alliance Trust Company or the holder of the notes secured by the deed of trust or their "legal representatives," and since the Alliance Trust Company was a corporation, and a corporation never dies, and therefore could have no executor or administrator, the words "legal representatives" were intended to include an agent, and that therefore the power in question was properly executed by Caldwell as agent of the Alliance Trust Company under the general power of attorney which he held. As an answer to this suggestion we say:

First—The primary meaning of the words "legal representatives" is executors or administrators, and does not include agents. 18 Am. & Eng. Ency. Law [2d ed.], 813, 816; *Railroad Co.* v. *Hunter,* 70 Miss., 471. And that under the rule of *strictissimi juris* these words should be given their primary meaning.

Second—If the words "legal representatives" include an agent, then the power was a matter of personal confidence reposed in the agent, to be executed by him in his own name as agent, and not in the name of the Alliance Trust Company; whereas the power in question was executed by the agent in the name of the Alliance Trust Company.

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Brief for appellees.

Third—The power in question is conferred upon the Alliance Trust Company or holder of the notes secured, or their legal representatives; and since the Alliance Trust Company being a corporation could not die, and therefore could not have an executor or administrator, and since the holder of the notes might be a natural person who could die and have an executor or administrator, and since "legal representatives" primarily means executors or administrators, the words "legal representatives," under the rule of *strictissimi juris,* should be construed as applying only to the holder of the notes, and not as applying to the Alliance Trust Company.

Fourth—If the words "legal representatives" be applied to the Alliance Trust Company, and it be held that, as it is a corporation, and as such could not have an executor or administrator, the words "legal representatives," as used in the power, included an agent, what will be the meaning of the words "legal representatives" as applied to the holder of the notes, who might be a natural person?

If, as applied to a natural person, the words "legal representatives" should be held to mean executors or administrators, but, as applied to a corporation, the Alliance Trust Company, these words mean an agent, then we have the same words, in one and the same clause, meaning one thing so long as the corporation holds the notes secured, and meaning another thing if the corporation should transfer the notes to a natural person. Such a construction is not allowable, and the words "legal representatives" should be construed as applying only to the holder of the notes, who might be a natural person, and not as applying to the Alliance Trust Company, who, in the nature of things, could have no legal representatives according to the true meaning of those words.

Argued orally by *H. C. Watson,* and *Robert Powell,* for appellant, and by *R. B. Campbell,* for appellees.

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Opinion of the court.

CALHOON, J., delivered the opinion of the court.

The very able brief of learned counsel for appellant states the rule as to the meaning of the phrase "legal representatives" as we understand the best modern authorities to define it. The phrase has no hard and fast meaning. It usually means executors or administrators; but it cannot, of course, mean executors and administrators only, in whatever instrument it may appear, and with reference to all the different subject-matters treated of in the multitude of varying instruments, and no matter what the plain purpose of the maker of the instrument using the phrase may be in using it. The court construing the meaning of the phrase arising upon the face of a particular instrument having reference to a particular subject-matter must seek to find the purpose of the party using it in using it as he does. "The what and where, with whom, and when and why" of the use of a phrase in any particular case must all be considered to reach a proper conclusion as to what the phrase may mean just in that case. So the authorities clearly demonstrate that it may, in various circumstances, mean executors, administrators, heirs, legatees, assignees, and devisees, even while legatees or devisees are strangers; in short, it may mean any person or corporation taking the beneficial interest in property, real or personal. One is not usually within the definition of "legal representative," however it may be as to the phrase "personal representative," unless he represents the other in beneficial ownership.

The words of the power to be construed in this case are as follows: "In case of the refusal, neglect, or incompetency to act of said trustee, or his absence from the state or his decease, then said party of the third part (the Alliance Trust Company), or any holder of said note or notes, or their legal representatives, can, at any time they may desire, appoint a trustee in the place of the said party of the second part (the original trustee, Currier), or any succeeding trustee, whose acts done in the premises shall be of the same validity as if done by the

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trustee hereinbefore named." The power to appoint a substituted trustee is vested in three classes of persons: First—In the beneficiary company, the corporation itself. Second—In any holder of the note or notes secured. Third—"Their legal representatives." There is not, on any fair construction of these words, any delegation of power to the trustee in the deed to appoint a substituted trustee in this deed of trust, nor are there any words which authorize the trustee in this instrument to delegate any personal confidence or trust or discretion in or selection of a substituted trustee to any attorney in fact or agent of the corporation. Undoubtedly, a power of this kind may be so drawn as to delegate the personal confidence or trust or discretion to appoint a substituted trustee to the first trustee. If parties choose, they can so empower the first trustee to delegate the personal confidence or trust, but the difficulty here is that no such authority is given the first trustee. Who may appoint, in the exercise of this power, the substituted trustee? The corporation itself may do so, acting in making such an appointment through its directors. The trustee in this instrument is not the corporation, nor is the attorney in fact Caldwell. Any holder of the notes may also appoint. The crucial question in the construction of the clause having the power is, who are meant by the phrase "their legal representatives?" We think they mean the legal representatives of the holders of the notes. This appears to us clearly to be so from several considerations: First—The collocation of the words indicated. Second—The use of the plural pronoun "their" so indicates. Third—And chiefly the phrase "legal representatives," as applied to the holders of the notes, would seem, in this connection, their executors or administrators, and this use of the phrase is perfectly proper as applied to natural persons, and wholly improper as applied to corporations, in this sense, since they never die and never have any legal representatives. It is well observed, too, by learned counsel for appellees, that not to so hold, but to hold that the agent or attorney in fact

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of the corporation satisfies the phrase "legal representatives," would be assigning to the very same phrase in the very same sentence the meaning of executors or administrators as applied to natural persons, and of agent, in its broadest sense, as applied to corporations. Manifestly, whatever "legal representatives" meant in this sentence, it meant the same thing for the corporation and natural persons. Fourth—As we have said in the outset, any person or corporation which takes beneficially from another person or corporation may, if the particular instrument and the particular subject-matter show that plainly to be the purpose in using the phrase, satisfy the meaning of this phrase "legal representatives," and in that view the assignee of a corporation may be the legal representative in a proper case. So those appointed by statute or otherwise to wind up the business of an insolvent or dissolved corporation may be its legal representatives, but it is perfectly manifest that the agent and attorney in fact, Caldwell, in this case took no beneficial interest whatever in this property. He had no duty to perform in respect to the matter of a sale, except to make the sale, execute the conveyance, etc. The particular power which he exercised here was the power to appoint a substituted trustee, and this power could be exercised alone, under the terms of this instrument, by the corporation itself, or some assignee taking a beneficial interest in the property. We are therefore of the opinion that this case may properly be decided by a mere construction of the terms of this power; and in construing them we hold that the agent and attorney in fact, Caldwell, had no power to make this sale, and hence it was absolutely void. It is useless to refer to authorities showing that the rule of construction as to powers is *strictissimi juris*. This court has gone farther, perhaps, than any court in the Union in upholding that doctrine.

We wish to say a cautionary word. We are not to be understood as holding now that one can repose a personal confidence or trust in a corporation. The doctrine of *delectus per-*

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sonae, which vitalizes this whole doctrine of special confidence and trust, properly enough applies to the selection of a natural person in whose integrity and confidence the donor of a power may confide, because he knows the donee to be of such honor as to specially fit him for the trust. But a corporation, conceived of as an abstract legal entity, it might be argued, is not such a donee of a power as can have trust reposed in it because of confidence in its personal honor. And it might further be said that its directors, at the time of the vesting of the power under the instrument, may be regarded as constituting, within the scope of the *delectus personae* doctrine, the personality of the corporation; yet they may be wholly changed every year or otherwise, and so, if person or personality, if that term better pleases, in whom, in this view, the confidence would have been reposed, being gone, the corporation could not exercise the power which manifestly the grantor had intended it to exercise. And it may further still be said that, when reference is had to the nature of this *delectus personae* doctrine, this doctrine of reposing confidence and trust because of known integrity, on the one hand, and, on the other, to the nature and legal constitution of a corporation, it ought to be manifest that the doctrine can have no proper application to a corporation, but that a court should always hold on this point—construing this sort of power, vested in a corporation by this sort of instrument—that the grantor did not give the power to the corporation under the influence of the *delectus personae* doctrine, but that power so to appoint was purchased by the corporation as a part of the consideration named in the instrument, to be irrevocably exercised by it. We repeat, we are not to be understood as announcing any holding on either of these propositions, because decision here only requires a proper construction of the terms in which the power has been couched. Of course the appellant must do equity if he seeks equity, and just as certainly he would be estopped to set up any statute of limitation against the enforcement of the claim, and the ap-

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Statement of the case.

pellee has nothing still to do except to enforce its security in the proper way. But this sale is absolutely void, and no title passed under it; and this seems to be the only point which the court below adjudged. At all events, it is the only point which we adjudge, and on this proposition the decree is affirmed.

It will be noted that we have not cited an authority, since they are fully and discriminatingly collated by the counsel on both sides in their unusually able briefs.

Affirmed.

ROBERT L. BUCHANAN v. STATE OF MISSISSIPPI.

CRIMINAL LAW. *Murder. Juries. Special venire. Code* 1892, § 2389.

If an impartial jury be obtained in a murder case, the defendant cannot, after conviction, predicate error of an irregularity in the drawing of a special venire, since the statutes on the subject (Code 1892, § 2389) are directory.

FROM the circuit court of, first district, Chickasaw county.

HON. EUGENE O. SYKES, Judge.

Buchanan, the appellant, was indicted for the murder of one Dehay, tried and convicted of manslaughter, sentenced to the penitentiary for fifteen years, and appealed to the supreme court.

T. J. Buchanan, and *Mayes & Longstreet*, for appellant.

A. T. Stovall, and *J. N. Flowers*, assistant attorney-general, for appellee.

Argued orally by *Edward Mayes*, and *T. J. Buchanan*, for appellant, and by *A. T. Stovall*, for appellee.

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Opinion of the court.

TRULY, J., delivered the opinion of the court.

Very many assignments of error are presented to the court. Some of them do not appear in the record. Others are in reference to the action of the court in drawing the special venire. As it is firmly fixed that the laws in this regard are simply directory, and as it is not contended that he was not tried by a fair and impartial jury, we cannot see that any harm was done the appellant.

The assignment most strongly relied on is that the proof is not sufficient to sustain a conviction of manslaughter. It is earnestly contended that the verdict of the jury should be set aside and the case reversed on the facts. The testimony adduced on the part of the state, if believed by the jury, considered in connection with the environment and attendant circumstances of the homicide, the location of the wounds upon the body of the deceased, and the range of the fatal bullet, are amply sufficient to sustain this conviction. The jury had the witnesses before them, saw them upon the stand, observed their demeanor and noted their manner of testifying, and, under the law, were given the right to pass upon and decide which story they would believe. They adopted as true the theory of the prosecution as testified to by the witnesses and corroborated by the physical facts, and we are not prepared to say that their conclusion was erroneous.

There is manifestly no error of law. The instruction for the state defining manslaughter is in the exact language of the code, and every phase of appellant's defense was fully and fairly presented by the numerous and liberal instructions granted in his behalf.

We must decline to invade the province of the jury. The judgment is affirmed.

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Statement of the case.

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HENRY MARX ET AL. v. EDWARD C. JORDAN.

DEEDS. *Wrong person named as grantor. Record. Notice.*

Where the scrivener, supposing a certain person was to execute a deed, wrote his name therein as the grantor, but it was signed, acknowledged, and delivered by another person not mentioned in the instrument, its record is not constructive notice to a subsequent purchaser that it was the deed of the person who signed it.

FROM the circuit court of Claiborne county.

HON. GEORGE ANDERSON, Judge.

Jordan, appellee, was plaintiff, and Marx and others, partners under the name Henry Marx & Sons, appellants, were defendants in the court below. From a judgment in plaintiff's favor the defendants appealed to the supreme court.

David Bowie and his wife, Frances Bowie, were indebted to appellants, Henry Marx & Sons, and, desiring to secure the debt and advances to be made in the year 1902, undertook to execute a deed of trust to secure same. In the granting clause of the deed of trust the names of Frank (not David) and Frances Bowie were written. The deed of trust was signed and acknowledged by David and Frances Bowie, covered the crop for the year 1902, and was recorded. Afterwards David Bowie executed a deed of trust to appellee, Jordan, trustee, to secure a debt due from him to the Quong-Thomas Company. This deed of trust was also acknowledged and recorded and incumbered the same crop. In the fall of the year 1902 David Bowie delivered his cotton to Henry Marx & Sons. This suit was brought by Jordan, trustee, for the Quong-Thomas Company, to recover the proceeds of the cotton delivered by David Bowie to Henry Marx & Sons. Other facts are stated in the opinion of the court.

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Brief for appellants.

E. S., J. T., and *H. W. M. Drake,* for appellants.

The trust deed executed by David Bowie to Henry Marx & Sons was entitled to record, as it was properly acknowledged, and acknowledgment is the only thing essential to entitle such an instrument to record. The statute as to registration does not concern itself with the contents of an instrument, but simply with the acknowledgment of it. Once properly acknowledged, it is entitled to record. Annotated Code, § 2457.

And once recorded, all are charged with notice of its contents. This deed of trust was properly acknowledged and recorded, and the Quong-Thomas Company were charged with notice thereof; were not only charged with notice of the name appearing in the caption, but with notice of the property conveyed, which was the same, in part, conveyed by the trust deed to them. They were charged with notice of the fact that David Bowie had signed this trust deed to appellants; that he had delivered it and acknowledged it.

All of the cases relied upon by appellee are cases where the name of the grantor as to whom the conveyance was held void did not appear at all in the body of the conveyance. In this case a name does appear in the body of the conveyance. It is true that the Christian name of the person described in the body of the conveyance is different from the Christian name by which it was signed and acknowledged. In other words, it is a mistake in the Christian name, and the authorities hold uniformly that a mistake in the Christian name will not avoid the conveyance if the true name can be ascertained from the remainder of the instrument. Devlin on Deeds, sec. 206; Tiedeman on Real Property, sec. 798; 9 Am. & Eng. Ency. Law (N. S.), 108.

In this case there is no difficulty in ascertaining the true name of the grantor from the remainder of the instrument, for he both signed and acknowledged it by his true name, David Bowie.

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Opinion of the court.

The Alabama cases should not control in the adjudication of the case at bar, since the statutes of that state are not like ours.

C. A. French, for appellee.

In my examination of the books, I find that the Alabama court has universally held that a deed signed by a party whose name does not appear in the granting clause is not the deed of such party when the deed undertakes to name the grantors, as in this case. *Johnson* v. *Goff,* 22 South., 995; *Davidson* v. *Cox et al.,* 20 South., 500; *Sheldon et al.* v. *Carter,* 8 South., 63. These are cases from the Alabama court, and are right in point that if a party who, in so far as the deed shows, signs and acknowledges the deed, it is not his deed, and may be treated as a nullity by third parties. See also *Harrison* v. *Simons,* 55 Ala., 510; *Hammond* v. *Thompson,* 56 Ala., 589; *Blythe* v. *Dargin,* 68 Ala., 370; *Fite* v. *Kennemer,* 7 South., 920; *Bank* v. *Rice,* 4 How., 225 (11 L. ed., 949).

WHITFIELD, C. J., delivered the opinion of the court.

In the alleged trust deed to M. Levy, trustee for the benefit of Henry Marx & Sons, of date March 3, 1902, the granting clause of the deed expressly names as sole grantors Frank Bowie and Frances Bowie. In the reciting part of the trust deed it is stated that they are indebted in the sum of $139.70, "evidenced by their note." At the conclusion of the trust deed it is recited that, "In testimony whereof the said party of the first part set their hands," etc., in the plural.

From this simple statement of the exact instrument before us, several things are evident. First—This is not the case of a deed in which the grantors are not named. Both grantors are expressly named in the reciting part of the instrument, and in the granting clause of the instrument, and in the conclusion of the instrument; "said party of the first part," in the last, meaning, of course, the previously recited grantors, Frank Bowie and Frances Bowie.

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Opinion of the court.

Second—This is not the case of a wife seeking to convey her separate estate, in which the husband's name does not appear as grantor, but in which his name is signed to the deed, and his acknowledgment duly taken; nor one in which the husband, though not named as grantor, and not having signed the deed in the proper place for signature together with the wife, declares after the signature of the wife in writing "that he hereby consents to the above obligation of his wife," and signs that and acknowledges it, as was the case in the cases of *Stone* v. *Montgomery,* 35 Miss., 83, and *Armstrong* v. *Stovall,* 26 Miss., 275. It may just as well be noted, besides, that in these two cases the court seems to have proceeded quite as much upon the idea that the husband would be estopped, by what he had done, to deny that he had consented, as upon the idea that what he did amounted originally to an execution of the deed.

Third—This is not the case in which the scrivener intended to write the name of a particular party (David Bowie), but wrote his name wrong. There is no mistake of that sort here. It is perfectly plain that the scrivener meant to write "Frank Bowie" and "Frances Bowie," and to write them as the names of those two persons, and that he did not intend to write the name of David Bowie in the deed at all. He manifestly supposed that Frank Bowie and Frances Bowie were the grantors to be bound, and he wrote that intention plainly and clearly down. It may be quite true that he made a mistake in supposing Frank Bowie and Frances Bowie were to be the grantors; but that mistake cannot convert an instrument plainly declaring that Frank Bowie and Frances Bowie executed the instrument, and that they alone executed it as grantors, into an instrument made by a party who was not recited as a grantor in it, who clearly was not intended to be a grantor in it, but who, in some curious way, signed and acknowledged it. The deed is and must be—that is, the deed before us, with its particular recitals—the deed of the parties who are expressly de-

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clared to be the grantors, who expressly granted the things conveyed, and who alone anywhere in it appear to have been intended as grantors.

Fourth—And, finally, this is the case of a deed in which, therefore, the grantors are expressly recited in it. Said grantors expressly conveyed by a deed effectual only as against them. Is it possible that the fact that David Bowie signed such a deed, effectual only for such a purpose, and acknowledged it, can make such a deed his deed? Manifestly not. The testimony in the case shows that Frank and Frances Bowie were husband and wife, and that David Bowie was their son. It is not, therefore, a case of mistaken identity on the part of the scrivener. He wrote exactly what he meant to write. He wrote a deed which could only bind the parties expressly named therein as grantors. See the authorities collected in Devlin on Deeds, vol. 1, sec. 194 through 206. See, also, the Alabama cases cited in the brief of counsel for appellee.

The precise question presented for adjudication here is: Did this alleged trust deed to Henry Marx & Sons, having been recorded, impart notice to third parties? Was the appellee notified by the record of such an instrument that it was the deed of David Bowie? We are clearly of the opinion that no such notice was imparted.

Affirmed.

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Statement of the case.

LAUREL COTTON MILLS v. GULF & SHIP ISLAND RAILROAD COMPANY.

1. INTERSTATE COMMERCE. *Intrastate shipments. Agreement as to rates. Discrimination. Code* 1892, §§ 4287, 4290.

A contract by a railroad company to maintain rates from a factory, not exceeding to competitive points the rates from other factory towns, is not on its face void for discrimination, under the Interstate Commerce Act of February 4, 1887, 24 Statutes at Large, 379; nor Code 1892, §§ 4287, 4290.

2. SAME. *Milling in transit.*

A contract by a railroad company to credit to freight charges on manufactured goods any freight received on raw material shipped to the factory, is a milling-in-transit agreement, and does not violate the statutes mentioned above.

3. SAME. *Code* 1892, § 4292.

The Interstate Commerce Act, sec. 6, and Code 1892, § 4292, providing for the publication by railroads of schedules of rates and forbidding deviations therefrom, do not render invalid a contract by a railroad company to charge no greater rate from a factory to competitive points than is charged from other places, nor prohibit the maintaining of a milling-in-transit agreement, in the absence of any showing that the rates fixed by the contract were different from the approved rates, or that any schedule of rates had been submitted to the commission at all before the contract was made.

4. SAME. *Approval of rates. Burden of proof.*

The burden is not on the plaintiff to show, in a suit against a railroad for breach of contract to transport freight at a specified rate, that the contracted rate had been filed with the Interstate Commerce Commission or approved by the State Railroad Commission, as required by the Interstate Commerce Act, and Code 1892, § 4292.

FROM the circuit court of Jones county.

HON. JOHN R. ENOCHS, Judge.

The Laurel Cotton Mills, appellant, was plaintiff, and the Gulf & Ship Island Railroad Company, appellee, defendant in the court below. From a judgment sustaining a demurrer

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Statement of the case.

to the declaration and dismissing the suit the plaintiff appealed to the supreme court.

The suit was originally begun in the circuit court of, first district, Hinds county, but by consent of parties the venue was changed to the circuit court of Jones county. The suit was for an alleged breach of the following written contract—viz.:

"This memorandum of contract, made this seventh day of February, 1900, by and between the Laurel Cotton Mill Company, a corporation under the laws of the state of Mississippi, of Laurel, Mississippi, party of the first part, and the Gulf & Ship Island Railroad Company, of Mississippi, party of the second part,

"Witnesseth: The Laurel Cotton Mill Company, or party of the first part, proposes to construct and operate a cotton mill at Laurel, Jones county, Mississippi, and in consideration of the covenant herein agreed to be kept and performed by the parties of the second part, it agrees to locate and build the said cotton mill and warehouses belonging to same on the ground now staked out as agreed upon, accessible from the said Gulf & Ship Island Railroad Company, and further agrees to furnish the right of way for necessary switches to connect the track of the Gulf & Ship Island Railroad from both directions with the cotton mill grounds and buildings.

"The party of the second part, in consideration of the performance of the above-named covenant of the party of the first part, agrees to maintain in effect rates on manufactured goods produced by the said Laurel Cotton Mills, not exceeding, to competitive points, the rates effective from Stonewall and Meridian, Mississippi, on the dates.

"And further agrees to maintain in effect a milling-in-transit arrangement for the cotton to be manufactured at the said Laurel Cotton Mills—that is to say, any freight charges that may be paid on cotton shipped from stations between Hattiesburg and Jackson, or on the Laurel Branch on the lines of the said

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Brief for appellant.

Gulf & Ship Island Railroad Company, to the Laurel Cotton Mills, shall be allowed and credited, pound for pound, as part payment of freight charges on the manufactured goods or products when shipped to market over the lines of the said Gulf & Ship Island Railroad Company. This arrangement to continue for a period of ten years.

"Party of the second part further agrees to deliver at New Orleans rates all materials, machinery, and supplies used in the construction of the said cotton mills as first built, or future additions thereto of main buildings, or additional machinery, that increases the capacity of the plant, when shipped from points north or east of Birmingham, and in case coal should be required by the said Laurel Cotton Mills, and provided they wish to ship same by the New Orleans & Northeastern Railroad to Laurel, the charges for switching from said railroad to the Laurel Cotton Mills shall not exceed two dollars and fifty cents ($2.50) per car.

"In witness whereof the said parties have hereunto set their hands on the day and year first above written.

"[Signed] LAUREL COTTON MILLS.

"GULF & SHIP ISLAND RAILROAD COMPANY."

Howe, Spencer & Cocke, and *Catchings & Catchings,* for appellant.

It will be seen at a glance that the rates provided for by the contract are not by its terms made exclusive. In other words, so far as the contract is concerned, the Gulf & Ship Island Railroad Company is at liberty to give the same rates to any other cotton factory, or, indeed, to any other industry of any kind whatsoever, or, if it thinks best, to give even lower rates to other persons. Its only purpose and its only effect is to guarantee to the Laurel Mills that it shall, during the period of its currency, enjoy a certain rate without the least regard to the rates enjoyed by other persons.

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Brief for appellant.

It will also be seen that so far as the contract is concerned, the rate provided for is not a secret rate, but that it may, without offense to the provisions of the contract, be published and made known to all the world. It further appears that the rate provided for is not based upon any other rate—that is to say, the Laurel Mills are not promised a rate less than, or in any way different from, the published rates; and that so far as the contract is concerned, the rates provided for may in fact be the published and established rates.

It should also be noted that it appears from the very face of the contract that the rate provided for was not intended to, and could not, go into immediate effect. The consideration of the contract was the future building of the Laurel Mills, and of course no shipments could be made by the mills until they were built.

A mere glance at secs. 2 and 3 of the interstate commerce act suffices to demonstrate that their purpose and effect were not to render unlawful all discriminations. Under sec. 2 the discrimination to be unlawful must be between shippers of "a like kind of traffic under substantially similar circumstances and conditions," while under sec. 3 to be unlawful the discrimination must subject some particular person or locality to "an undue or unreasonable prejudice or disadvantage." It is too plain for argument that the expression of these qualifications is an affirmance that it was not intended to render all discriminations unlawful. This has been held many times by the courts. *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S., 197; *Interstate Commerce Commission* v. *Ala. M. R. Co.,* 168 U. S., 177.

Not only does the contract here in controversy not show, in the light of these decisions, an undue or unreasonable preference or discrimination, but it does not even show a preference or discrimination, whether just or unjust.

The supreme court has held that the question of unjust discrimination is a question of fact. How, then, could such a ques-

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tion be determined on demurrer to a declaration which discloses none of the facts which the supreme court says must be taken into consideration? *McNees* v. *Railway Co.*, 22 Mo. App., 224; *Bayles* v. *Kansas Pacific R. Co.*, 22 Pac. Rep., 341.

Certainly, we think, under the decisions in *Louisville & Nashville R. R. Co.* v. *Commonwealth of Kentucky*, 57 S. W., 508; *Hoover* v. *Penn. R. R. Co.*, 47 Atl., 283 (s. c., 156 Pa. St., 220); *Commonwealth* v. *L. & N. R. R. Co.*, 68 S. W., 1103, the rate provided for in the contract would be justifiable as against all other persons who are not in precisely the same condition as the Laurel Cotton Mills. In those cases it was expressly declared that it was not an undue preference to give a manufacturing establishment a rebate on the coal to be consumed by it which was denied to dealers in coal, inasmuch as a manuacturer was not a competitor in the business of dealing in coal with a coal dealer and inasmuch as the railroad expected increased compensation for handling the manufactured products. If it was allowable to give a rebate to manufacturers on coal consumed by them in manufacturing, it would of course be allowable to haul their coal free. In those cases, and we think their reasoning unanswerable, it was held that the railroads had the right to make the contracts in question, as they resulted in establishing important manufacturing industries on their lines whose products they would haul to market; that the manufacturing concerns as purchasers of coal not being competitors with dealers in coal, and not being shown that they had any rivals in the manufacturing business to whom the rebates were denied, the result of the contracts was to benefit the manufacturers and the carriers without injury to other persons. We invite the careful attention of the court to these cases, as we regard them as of the highest importance in illustrating what is meant by unjust discrimination.

It is difficult to see how the question of legality, under sec. 6, can be raised on demurrer in view of the fact that neither

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the contract nor the declaration contains a word or a line on the subject of the filing of rates.

Aside from the question of pleading the primary and radical defect of appellee's argument seems to be the idea that the rate published as required by sec. 6 must be rigidly and unqualifiedly uniform. As we have seen, the whole act must be construed together, and secs. 2 and 3, by prohibiting unjust discriminations, impliedly authorize discriminations and preferences which are just. Indeed, the whole question of uniformity is exhausted by secs. 2 and 3. The whole and only purpose of sec. 6 being to require publicity, the rates published in accordance therewith can contain rebates and discriminations *ad libitum,* and that section will not be offended.

Altogether, aside from the question of pleading, we deny that there can be any presumption that the appellee has filed any rates with the interstate commerce commission. The court will take judicial notice that the Gulf & Ship Island Railroad is wholly within the limits of the State of Mississippi. It has been repeatedly held, and necessarily so, that the interstate commerce law and the interstate commerce commission have no application to and no concern with rates other than inter-state rates. The Gulf & Ship Island Railroad can have no inter-state rates unless it makes joint rates with some other carrier. The interstate commerce act does not require carriers to make joint rates; it merely provides that when such rates are made they shall be filed, published, and observed. *Chicago & N. W. R. R.* v. *Osborne,* 52 Fed., 912; *Gulf, Etc., Ry. Co.* v. *Nelson,* 23 S. W., 732.

Even therefore assuming appellee's argument to be correct, that because the statute creates a duty to file rates, it must be presumed to have been done, the Gulf & Ship Island Company cannot be presumed to have filed joint or interstate rates, because it was under no obligations to make them. Thus giving full effect to the presumption invoked by appellee, however inconsistent, it cannot render the contract rates violative of

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sec. 6, because as to the making of joint rates no duty exists and the presumption cannot therefore apply.

It is important also to remember that the interstate commerce commission has no power to fix rates. *C., N. O. & T. P. Ry. Co.* v. *I. C. Com.*, 162 U. S., 184; *I. C. Com.* v. *C., N. O. & T. P. Ry. Co.*, 167 U. S., 479.

Sec. 6 does not render invalid a promise to give a certain rate because at the time the promise was made some different rate was in force and effect and was filed and published as required by law. It simply provides that so long as one rate is filed and published no different rate can be charged. It follows from this that even assuming that at the date of the contract a rate different from the rate promised to be given was filed, the contract was not thereby rendered invalid. While the old rate was filed the promised rate could not be given, but the promise remained none the less valid and binding, though temporarily unenforceable. It would become not only valid, but actually enforceable, as soon as the rate agreed upon should be filed and published in accordance with the duty resting upon the appellee.

The declaration is demurred to because of its alleged violation of §§ 4287, 4290, 4291, 4292, and 4293, Code 1892. Does the contract violate secs. 4287, 4290, or 4291?

In discussing secs 2 and 3 of the interstate commerce act we have already gone fully into the question of discriminations, just and unjust, and have shown that it is only unjust discriminations which are prohibited by that law. We have discussed fully, too, what is meant by the term "unjust discrimination," and it is not our purpose to again go into that question. We can, we think, demonstrate that it is only unjust discriminations which are forbidden by the laws of Mississippi, and that upon this subject they are practically identical with the laws of the United States. We will therefore merely refer to our prior argument for illustrations of what discriminations are unjust. It may be well, however, to reiterate what we have already said

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in regard to the peculiar provisions of the contract in question —viz., that it contains not the slightest indication on its face that it is discriminating, and that so far as appears the rates thereby promised may be given to every shipper on defendant's road.

The only possible distinction which can be drawn between secs. 4287 and 4290 and secs. 2 and 3 is that at a first glance sec. 4287 seems to make illegal "any discrimination" without the qualification contained in secs. 2 and 3, that to be illegal it must be unjust.

When the exact language is considered, however, the apparent distinction is seen not to exist:

"If any railroad shall, for its advantage, or for the advantage of a connecting line, or for that of any person, locality, or corporation, make any discrimination in transportation against any person, locality, or corporation, unless authorized by the commission," etc.

Thus to be unlawful a discrimination must be made for the advantage of one person and against another person, or, in other words, must be unjust discrimination. For the test of injustice is whether or not some person gains an advantage at the expense of or against another. This can only occur where the shippers, by reason of the similarity of their situations, are entitled to fare alike. That this is the correct interpretation of sec. 4287 is shown by sec. 4290, which directs the commission to inquire in considering rates "whether or not discrimination be made improperly against any person, corporation, or locality."

This is further shown by sec. 4297, which directs the commission to inquire whether any rates "operate so as to effect unjust discrimination," and is conclusively shown by sec. 186 of the constitution of Mississippi, which is as follows:

"The legislature shall pass laws to prevent abuses, unjust discrimination, and extortion in all charges of express, telephone, sleeping car, telegraph, and railroad companies, and shall enact

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laws for the supervision of railroads, express, telephone, telegraph, sleeping car companies, and other common carriers in this state by commission or otherwise, and shall provide adequate penalties to the extent, if necessary for that purpose, of forfeiture of their franchises."

It will be seen from this that the power of the legislature is limited by the constitution to the prevention of unjust discrimination only. It was not intended to confer upon the legislature the power to prevent all discriminations, and the common law rule in this regard is fully recognized and established by this provision of the constitution, for under the common law carriers are not allowed to make unjust discriminations. In other words, this section of the constitution merely requires the legislature to see that the common law rule as to discriminations is enforced. The precise question was before the supreme court of Illinois in the case of *Chicago & Alton R. R. Co.* v. *People, ex rel Koener,* 67 Ill., 11. The constitution of Illinois contained the following provision:

"The general assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different roads in the State, and enforce such laws by adequate penalties to the extent, if necessary for that purpose, of forfeiture of their property and franchises."

A law which had been passed by the legislature of Illinois, forbidding any discrimination whatever, whether just or unjust, was declared by the supreme court of that state to be void upon the ground that the constitution only empowered the legislature by suitable laws to prevent unjust discrimination.

Commenting upon a similar provision of the Colorado constitution, the supreme court of that state in *Bayles* v. *Kansas Pac. Ry.,* 13 Col., 181, said:

"While this provision remains in force, it may well be doubted whether this court or the legislature can declare that a railway company shall not discriminate in charges at all, or that

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mere inequality in rates shall constitute an undue or unjust discrimination."

The supreme court of Kentucky in the case of *Louisville & Nashville Ry. Co.* v. *Commonwealth,* 46 S. W., 702, in speaking of a provision of the Kentucky constitution, said:

"For the authority given to the legislature to so regulate transportation by general law as to prevent unjust discrimination is a recognition of the expediency and justice of authorizing discrimination deemed just."

If by reason of the constitutional prohibition the legislature cannot prohibit all discriminations, it cannot provide that no discrimination, whether just or unjust, shall be made unless authorized by the commission; for this would be to enable the commission, by refusing its consent, to in effect prohibit all discriminations, and certainly the legislature cannot authorize or empower the commission to do what it cannot itself do.

In view of these considerations we submit with the utmost confidence that the Mississippi statutes, like the Federal statutes, are merely declaratory of the common law, so far as they relate to unjust discrimination, and that the contract in question cannot offend the one unless it offends the other, if it be assumed that both apply.

We think we have shown that upon the present pleadings at least the court cannot find that unjust discrimination has been made. Does the contract violate secs. 4292 and 4293?

It is manifest that the purpose of secs. 4292 and 4293, in connection with sec. 4287, was precisely the same as that of sec. 6 of the interstate commerce act. Section 4287 prohibits a railroad from charging more than the rate fixed or approved by the commission; sec. 4292 prohibits the charging of less, by any device; and sec. 4293 imposes a penalty upon a railroad for permitting such deviation. The net result is to require railroads to charge only the rates fixed or approved by the commission, when in fact any rates have been so fixed or approved. The test of illegality under these sections is the

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same as under sec. 6. In either case two facts must concur: (1) A rate fixed or approved, and (2) the charging of a less or greater rate. The only difference is that under the Mississippi law the commission has power to permit a deviation, while under the Federal law the rates when filed and published cannot be deviated from even with the consent of the interstate commerce commission. The difference is to be accounted for by the fact that the state commission has the power to fix rates, while the interstate commerce commission has no such authority.

In discussing these sections we may therefore make exactly the same argument we made as to sec. 6. There is not a word or line in the contract or declaration upon the subject of the fixing or approving of rates by the commission. The Mississippi laws, like the Federal statutes, do not prohibit special contracts or special rates. The constitutional recognition that discriminations may be just, necessarily implies that when just they may be made. The Gulf & Ship Island Railroad can file such rates as it pleases within the charter limits. *R. R. Com.* v. *G. & S. I. R. R. Co.*, 78 Miss., 750. If, therefore, it is to be presumed that rates have been filed because the statutes impose a duty to file rates, it must be presumed that the whole duty was performed, and that therefore the schedules so filed contain an announcement that the Laurel Mills are entitled to the rates specified in the contract. As we said before, the milling-in-transit feature of the contract rates was actually given up to March, 1902. If it was given without being filed with the commission, the law was violated. Counsel for defendant ask the court to presume that the law was complied with, and this presumption necessarily carries with it the idea that the contract rates were filed when given. If because rates were given to the public generally it must be presumed that those rates were "fixed or approved," then because the contract rates were given to the Laurel Mills it must be presumed that they, too, were "fixed or approved."

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Brief for appellant.

Counsel cannot be permitted to split the presumption they invoke in two parts and adopt the portion that helps them while they repudiate the portion that injures them.

Much stress was laid on these sections in the argument below, which proceeded upon the theory that their purpose and effect was to make all rebates unlawful unless authorized by the commission. The fallacy of this construction, however, is shown by the very language used. It is not "rebates," as such, which are prohibited, but only "rebates or reductions from the tariffs of charges fixed or approved by the commission." If, therefore, no tariffs of charges have been fixed or approved by the commission, no rebates are unlawful under this section.

If the sections relating to discrimination had been omitted, the tariffs of charges filed could contain any number of unjust rebates or unjust discriminations. The only purpose of these sections is to secure adherence to the filed and published rates by prohibiting the charging of less than these rates. They apply not only to rebates or reductions in favor of one person, but to rebates and reductions in favor of the public as a whole. Under sec. 4292 no railroad can reduce its tariffs without the consent of the commission, but it can hardly be argued that the purpose of the law was to make it unlawful for railroads to lower their charges. That the chief purpose of this section is merely to prevent charging of less than the rates fixed or approved by the commission is shown by the fact that, while sec. 4287 prohibits the charging of more than those rates, sec. 4292 is the only section of the code which forbids the charging of less. In our opinion sec. 4292 would have precisely the same effect if it had merely forbidden the charging of less than the fixed or approved rates. Indeed, the word "rebate" is used as synonymous with "reduction."

Moreover, as the constitution recognizes that discriminations may be just, it would not have been competent for the legislature to have forbidden rebates altogether or to have put it in the

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power of the commission, by refusing its consent, to itself forbid them whether just or not.

A rebate can never be objectionable unless it is unjustly discriminating; for, as has been well said in a number of cases, it is but the fixing of an ultimate rate. The legislature's power is limited to the prevention of abuses and unjust discriminations, and, as we have said, rebates are not abuses unless they constitute unjust discriminations. It follows that the only rebates the legislature can forbid are unjust rebates.

The case of *Union Pac. Ry. Co.* v. *Goodridge,* 149 U. S., 680, was much relied on in the circuit court, and was cited as authority for the proposition that it is competent for a state legislature to provide that all rebates shall be unlawful unless first authorized by the state commission. A careful reading of the opinion will show that no such point was involved and no such ruling made. The Colorado constitution and statutes do not forbid rebates and special contracts, but provide that they shall be open to all "upon like conditions and under similar circumstances," with a power in the commission, however, under certain circumstances, to permit rebates, which would therefore be otherwise void for unjust discrimination. The court had before it a rate which it expressly held to be unjustly discriminating, and it decided that, as the consent of the commission had not been first obtained, it was void. The statute did not provide, and the court did not hold, that a rebate which was not unjustly discriminating had to be first approved by the commission. The whole utterance of the court upon the subject is directed against unjust discriminations.

So far from being more rigid than sec. 6, sec. 4292 is more liberal. For under the former no deduction can, under any circumstances, be made from the published rate, while under the latter such deduction can be made with the consent of the commission.

It is not sufficient to bring the contract within the condemnation of sec. 4292 to show that it provides for a rebate. It must

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be shown that it provides for a rebate from the rates fixed or approved by the commission.

Indeed, even this would not make the contract illegal. As we have said before, the contract was not to go into immediate effect. Therefore the appellee could have, and it was its duty, before any shipment was made, to have filed with the commission a schedule showing the contract rates, and as the commission has no power to fix its rates, they would have gone into immediate effect, subject to be attacked on the score of unjust discrimination. The court cannot presume that this was not done; but, whether done or not, the legality of the contract would not be affected, for, a contract legal when made, cannot be made illegal by the default of a party thereto, though it may for a time be thereby rendered unenforceable.

"But when the illegality does not appear from the contract itself, or the evidence necessary to prove it, but depends upon extraneous facts, the defense is new matter and must be pleaded, in order to be available."

"In an action on a written contract the contract must be construed on demurrer by the light afforded by the declaration alone, and not by circumstances that may be suggested, but which do not appear in the declaration." *Stout* v. *Whitney,* 12 Ill., 218.

"The illegality of a contract sued on must appear upon the face of the complaint, or it cannot be taken advantage of by demurrer." *Fairbank* v. *Leary,* 40 Wis., 644.

"If there was any illegality in the transaction, it should have been pleaded in bar." *Tyler* v. *Hand,* 7 How., 573.

The rule is, that if a plaintiff, in order to make out a cause of action, is required to show that the contract sued on is, for any reason, illegal, the court should not enforce it, whether pleaded as a defense or not. But when the illegality does not appear from the contract itself, or from the evidence necessary to prove it, but depends upon extraneous facts, the de-

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Brief for appellee.

fense is new matter and must have been pleaded in order to be available." *School District* v. *Sheidley*, 138 Mo., 672.

"Where a contract is fair on its face, the presumption of course is in favor of its legality, and the burden of proving that the consideration thereof was illegal, or that the contract was illegal for any other reason, is upon the party asserting such illegality, and to sustain such a defense it has been held that the illegality must be clearly shown." 15 Am. & Eng. Ency. Law (2d ed.), 1016, and cases cited.

"There is no presumption that a contract is illegal. He who denies his liability under a contract, which he admits having made, must make the fact of its illegality apparent. The burden of showing it wrong is on him who seeks to deny his obligation thereon. The presumption is in favor of innocence, and the taint of wrong is a matter of defense." *McBratney* v. *Chandler*, 22 Kan., 692.

E. J. Bowers, and *McWillie & Thompson*, for appellee.

If the contract in question violates either the state or the Federal statutes, it is void *in toto*, for the reason that it is a contract in contravention of a penal statute. Both the state and Federal statutes are aimed at the same clause in the contract—*i. e.*, the clause that provides for the rebate and milling-in-transit arrangement—and if this clause is obnoxious to either, the whole contract fails, because it is inseparable, and the interstate feature cannot be separated from the intrastate feature.

Sec. 4292, Annotated Code 1892, prohibits "any rebate or reduction from the tariffs of charges fixed or approved by the commission, . . . by a change in, or deviation from, the rates so fixed and approved, unless such change or deviation be first allowed by the commission."

Sec. 4293 makes any such rebates, deduction, or change a misdemeanor, and provides a penalty. Sec. 4292 provides that the tariffs should be posted.

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Brief for appellee.

We are unable to read these sections without being driven to the conclusion that any rebate made, under any circumstances, without the permission of the commission, is unlawful and punishable as a misdemeanor.

The test of the right to make the rebates, as fixed in sec. 4292, is not the question whether it discriminates against any one, but is whether it has been done with the permission of the commission. Of course we know no such permission has been granted, and the contract, therefore, to give a rebate and to make a change from the fixed tariff, is a violation of the law and a misdemeanor.

These sections contain no suggestion either of discrimination or that the hurt of any one is necessary in order to constitute any offense, but the giving of the rebate, and the making of the deviation or change, without the consent of the commission, is denounced as criminal. In other words, this sec. 4292 is exactly the same as the Elkins law, which forbids any deviation from the published rate.

Turning from the state to the Federal statute, we find the following:

Sec. 2 of the interstate commerce act forbids the "charging, demanding, or collecting from any person or persons a greater or less compensation for any service rendered, or to be rendered, . . . than it charges, collects, demands, or receives from any other person or persons for doing a like service in transportation of a like kind of traffic, under substantially similar circumstances and conditions."

In a note to this section, in a work styled "Interstate Commerce Law, Annotated," we find that the interpretation of this act by the American courts has been very different from that of the English act by the English courts, in that the latter has always required a specific intent to discriminate and injure, whereas no such intent is necessary under the American act. See 3 I. C. C. Rep., 624; 2 I. C. C. Rep., 120.

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Brief for appellee.

"Classification is recognized by the commission as necessary, but when used as a device to accomplish unjust discrimination, it subjects the parties to the penalty of the law." *Cox* v. *The L. V. R. R. Co.*, 4 I. C. C. Rep.; 3 I. C. C. Rep., 460.

"Where classifications of rates are involved as to one particular article of freight, it is proper to compare the rate in question with that of other articles similar in value, bulk, cost of carriage, and the like; and it is not necessary that such articles should be competitive." *Harvard Co.* v. *Penn. Co.*, 4 I. C. C. (3 I. C., 257); *Beaver* v. *P. C. & L. R. R.*, 4 I. C. C. (3 I. C., 564).

For a case of unjust discrimination by special rates on soaps of different grades, see *Pyle* v. *E. T., V. & G. R. R. Co.*, 1 I C. C., 465.

"It is not a valid excuse for failure to furnish cars to complain that such cars may be more profitably employed; such selection of goods is forbidden to common carriers." *Riddle et al.* v. *N. Y., L. E. & W. R. R. Co.*, I. C. C., 495. For free cartage case, see *Stone* v. *D., G., H. & M. R. R.*, 3 I. C. C., 613.

"The term, 'a like kind of traffic,' as found in sec. 2 of the act, does not mean traffic which is identical, but it means traffic which is like the elements upon which a fair and just classification is founded, and in the elements to be considered in the determination of what is a just and reasonable rate, and as to what are just and reasonable regulations." *N. Y. B. of T. et al.* v. *Penn. R. R. Co. et al.*, 4 I. C. C. (3 I. C. C., 417).

The term, under substantially similar circumstances and conditions, is used in the same sense both in the second and fourth sections of the act.

Note sec. 3 of the law, which is as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm or corporation, or locality, or any particular de-

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scription of traffic, in any respect whatever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatever."

We call attention especially to the fact that this forbids any preference or disadvantage to any particular description of traffic.

This view, in connection with the citation just above, establishes the theory that a discrimination in favor of one class as against another class is as much denounced by the law as a discrimination in favor of one of a class as against others of the same class. It is unlawful to discriminate in favor of one as against others of the same class. And it is equally unlawful to select one class of freight, or one class of shippers, and make them special favorites by making special facilities, giving special advantages, rebates, or the like.

Sec. 6 of the Federal statutes provides that every common carrier engaged in interstate commerce shall print and keep open to public inspection schedules, showing the rates, fares, and charges for the transportation of passengers and property, which said schedules shall be plainly printed in large type and posted in two public or conspicuous places in its depot, station, or office; and clause "e" of the same section provides that copies of all schedules, rates, fares, and charges shall be filed with the commission. The third and fourth paragraphs of said section are as follows:

"Notice of change of rates. No advance shall be made in the rates, fares, and charges which have been established and published as aforesaid by any common carrier in compliance with the requirements of this section, except, after ten days public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules

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in force at the time and kept open to public inspection. Reductions in such published rates, fares, or charges shall only be made after three days' previous public notice, to be given in the same manner that notice of an advance in rates must be given."

"Published rates not to be deviated from. And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force."

The prohibition against advancing or lowering any rate without notice, contained in paragraph three, and the provision of paragraph four, making it unlawful for such carrier to "charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any service in connection therewith, than is specified in the published schedule of rates, fares, or charges as may at the time be in force," operate to prohibit absolutely, and without qualification, any deviation whatever from published rates. They are tantamount to section 4292 of our law, which prohibits the making of any rebates.

The question raised under this section is not whether the discrimination is a lawful or unlawful one, nor whether the character of the traffic is substantially the same, or carried on under substantially similar conditions, but is the express prohibition against any deviation whatever from the rate established and fixed in the published tariff of charges filed with the commission and posted as required by law. The object of this section is to prohibit deviations from published rates, and is

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wholly disconnected from the prohibition against unlawful discriminations. An unlawful discrimination might easily be made by means of an established printed rate—that is, the rates might be so arranged and published as to operate unjustly and unfairly against a particular shipper or class of shippers, or a locality or section of the country; and still so long as the carrier adhered to the rate he would not be guilty of a violation of this section and could not be prosecuted under it.

The cases cited by appellant all deal with discriminations, and are none of them pointed at these clauses. It is apparent that one of the objects sought to be obtained by the law was certainly publicity and fixedness of rates, and to secure this section 6 was enacted.

Of course it is clear that any contract violative of law or public policy is void. *Bohn* v. *Lowry,* 77 Miss., 424; Black on Interpretation of Laws, 64.

"The authorities all agree that those contracts are illegal which rest upon a consideration that is fraudulent, against morality, or against the principles of some public policy, or in contravention of some statute." 2 Beach on Contracts, sec. 1415.

Argued orally by *O. W. Catchings,* for appellant, and by *T. A. McWillie,* and *E. J. Bowers,* for appellee.

TRULY, J., delivered the opinion of the court.

On the 7th day of February, 1900, the Laurel Cotton Mills, a domestic corporation, intending to construct and operate a cotton mill at the city of Laurel, on the line of the Gulf & Ship Island Railroad Company, entered into a contract with said railroad company by which it agreed and obligated itself to locate and build its said cotton mill and warehouses on certain grounds previously staked out and agreed upon, accessible from said railway, and to furnish the right of way for all

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necessary switches from both directions to connect the track of said railroad company with the cotton-mill grounds and buildings. In consideration of the performance of this covenant, the Gulf & Ship Island Railroad Company agreed on its part, by said contract, "to maintain in effect rates on manufactured goods produced by the said Laurel Cotton Mills, not exceeding, to competitive points, the rates effective from Stonewall and Meridian, Mississippi, on the dates," and "to maintain in effect a milling-in-transit arrangement for the cotton to be manufactured at the said Laurel Cotton Mills—that is to say, any freight charges that may be paid on cotton shipped from stations between Hattiesburg and Jackson, or on the Laurel Branch, shall be allowed and credited, pound for pound, as part payment of freight charges on the manufactured goods or products when shipped to market over the line of the said Gulf & Ship Island Railroad Company. This arrangement to continue for a period of ten years." This contract was duly signed by both the contracting parties. After its execution the Laurel Cotton Mills proceeded with the construction of its factory, and on April 1, 1901, began business; its said mill having been fully completed, and being then in full operation. From this date until the 1st of March, 1902, the Gulf & Ship Island Railroad Company observed on its part the stipulation of the contract in reference to the "milling-in-transit arrangement," as therein agreed upon. After that time it refused further to credit the freight charges paid on raw cotton on the shipment of manufactured goods made over its line by the appellant, as provided by the terms of the contract. At the date of the contract, and at all times subsequent thereto, there were established and in operation at Stonewall and Meridian, in this state, cotton mills manufacturing the same class of goods and being engaged in exactly the same line of business as the appellant. The Gulf & Ship Island Railroad Company ignored that provision of the contract by which it had obligated itself to grant to appellant rates on manufactured goods "not ex-

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ceeding, to competitive points, the rates effective from Stonewall and Meridian" on the date of shipment, but imposed on the shipments made by appellant greater rates to competitive points than the mills located at the two places mentioned were required to pay on shipments made by them to the same points. This condition of affairs continued until January, 1903, when the appellant filed its declaration setting out the above facts. It filed therewith a bill of particulars showing the amount of freight paid on raw cotton, and which it was entitled to have had credited on the freight charges on its shipment of manufactured goods under the milling-in-transit arrangement set out in the contract, and also a bill of particulars showing the amount of freight which it had been required to pay on shipments made to competitive points over and above the freight rates in force at the date of such shipments from Stonewall and Meridian to the same points. The bill of particulars showed that of the shipments under the milling-in-transit arrangement, many were interstate shipments from Laurel, in this state, to sundry points beyond this state. To this declaration the appellee filed demurrers, three in number, but presenting substantially but two points—viz., that the contract is void because (1) contrary to the law regulating interstate commerce; (2) contrary to the provisions of Code 1892, governing the supervision of common carriers. These demurrers were by the circuit court sustained, and from that judgment the Laurel Cotton Mills prosecutes this appeal.

The proposition upon which appellee relies may be broadly stated as follows: The contract sued on is void on its face, because it has the necessary effect of creating a discrimination forbidden both by the federal interstate commerce act and our own state statute dealing with the same subject-matter, and for the further reason that this milling-in-transit arrangement which is set out in the contract is the granting of a rebate, the allowance of which is unlawful, under §§ 4292, 4293, Code

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1892, and sec. 6 of the interstate commerce act (Act Feb. 4, 1887, ch. 104, 24 Stat., 380 [U. S. Comp. St. 1901, p. 3156]).

"Before we consider the phraseology of the statute, it may be well to advert to the causes which induced the enactment. They chiefly grew out of the use of railroads as the principal modern instrumentality of commerce. While shippers of commerce are under no legal necessity to use railroads, practically they are. The demand for speedy and prompt movement virtually forbids the employment of slow and old-fashioned methods of transportation, at least in the case of the more valuable articles of traffic. At the same time the immense outlay of money required to build and maintain railroads, and the necessity of resorting, in the securing of the rights of way, to the power of eminent domain, in effect disable individual merchants and shippers from themselves providing such means of carriage. From the very nature of the case, therefore, railroads are monopolies, and the evils that usually accompany monopolies soon began to show themselves, and were the cause of loud complaints. The companies owning the railroads were charged, and sometimes truthfully, with making unjust discriminations between shippers and localities, with making secret agreements with some to the detriment of other patrons, and with making pools or combinations with each other, leading to oppression of entire communities." We quote this language from the decision of the supreme court of the United States in *Texas & Pacific R. R. Co.* v. *Interstate Commerce Commission,* 162 U. S., 211 (16 Sup. Ct., 666; 40 L. ed., 940), as being as applicable to our own as to the federal legislation for the regulation of commerce and the supervision of carriers.

In dealing with the subject of the supervision of railroads and common carriers generally, the object of the legislation was to benefit and regulate commerce by preventing railroad corporations and all other common carriers from unduly favoring one shipper or class of shippers, or one special place, to the injury of other persons and places similarly situate. The

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first material inquiry, then, is whether or no the contract under review, in express terms or by necessary implication, presents a case of discrimination, within the meaning and intent of secs. 2 and 3 of the interstate commerce act (U. S. Comp. St., 1901, p. 3155), and §§ 4287, 4290, Code 1892. The object which both statutes referred to had in view was practically the same, and as stated—*i. e.*, to prevent unjust discrimination being made in transportation against any person, locality, or corporation. It must be noted that this discrimination must be unjust between shippers, persons, localities, or corporations, by granting undue preference to one or subjecting another to unreasonable disadvantage. The evident meaning of the federal statute—and we think the same is true of our own—is that the discrimination condemned must have the effect of unduly favoring some individual, class, or place at the expense and to the prejudice and disadvantage of some other shipper or place, where the services rendered were "like and contemporaneous," and where the transportation was effected under "substantially similar circumstances and conditions." *Texas & Pacific R. R. Co.* v. *Interstate Commerce Commission, supra.* All special contracts or traffic arrangements between carrier and shipper are not forbidden or condemned, but only such as operate unfairly and evidence undue favoritism toward one, or deprive another of his just rights. As said in a recent case where the policy, effect, and intent of the interstate commerce act was under review: "Subject to the two leading prohibitions that their charges shall not be unjust and unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage, or subject to undue prejudice or disadvantage, persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at common law—free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the

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same principles which are regarded as sound and adopted in other trades and pursuits." *Cincinnati, N. O. Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S., 184 (16 Sup. Ct., 700; 40 L. ed., 935). "It is not all discriminations or preferences that fall within the inhibition of the statute—only such as are unjust or unreasonable." *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.,* 145 U. S., 263 (12 Sup. Ct., 844; 36 L. ed., 699).

We accept the construction placed on secs. 2 and 3 of the interstate commerce act by the Supreme Court of the United States in the cases cited, and, adopting that construction as applicable to the corresponding provisions of our own statute (§ § 4287–4290, Code 1892), it is made manifest to our minds that all discriminations are not forbidden by either statute, but only "discrimination in transportation against some person, locality, or corporation," made for the advantage of the carrier, or by receiving greater or less compensation from one class of persons than from another for similar services contemporaneously rendered.

The contract under consideration obligates the railroad company to maintain on manufactured goods shipped from Laurel, Miss., rates not exceeding, to competitive points, the rates effective on the dates of the shipments from Stonewall and Meridian, where similar factories were located. We are unable to see that this stipulation is, in its terms, or by necessary effect, a discrimination against any other person or place. It is not a stipulation that other shippers similarly situated should not enjoy the same rates. This provision was simply an effort on the part of the Laurel Cotton Mills whereby it sought to protect itself against the imposition of greater rates than were charged by other carriers on similar shipments of manufactured products made by other cotton mills located at the places mentioned. We are unable to see how a provision in a contract which merely limits the freight rate to be imposed to the amount imposed upon others engaged in similar business

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can be construed to be a discrimination, within the meaning of that term or under the interpretation placed upon it by the supreme court of the United States. This was not an effort to secure an undue advantage to itself, but was a precaution to guard against future imposition by advancing rates—a measure the wisdom of which was demonstrated by subsequent events, culminating in the present litigation. It is not suggested anywhere in this record that at the date of this contract there was any other shipper over the line of the Gulf & Ship Island Railroad Company then engaged in a business similar to that in which appellant was about to embark, and it does not appear that all other shippers, if any such there were, located on appellee's line of railway, where the services rendered would be "like and contemporaneous," and where the transportation would be effected under "substantially similar circumstances and conditions," did not in fact enjoy the same rate which was stipulated for on behalf of appellant in the contract in question. And assuredly there is no express inhibition in the contract which precludes the railroad company from granting a similar rate to any other of its patrons who might thereafter engage in a like business with appellant. An unjust discrimination, within the purview of laws for the regulation of commerce, operates to the undue advantage of one person, and prejudicially to the interest of some other person. The contract under review does not have that effect. An agreement that one shall not be charged more than a certain stated rate, but which does not stipulate against or forbid the granting of the same rate to all other persons, is not within the condemnation of the law prohibiting discrimination.

Again, it is urged that this contract is void because the "milling-in-transit arrangement" which is therein recognized constitutes the granting of a rebate, which is unlawful, under § 4292, Code 1892, and is also violative of sec. 6 of the interstate commerce law. It is no longer open to question that milling-in-transit arrangements are recognized as valid agree-

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ments, which may be lawfully entered into between shippers and carriers. In the very recent case of *Central Yellow Pine Ass'n.* v. *V. S. & P. R. R. Co. et al.,* before the Interstate Commerce Commission, where the legality of milling-in-transit arrangements was considered in its various phases, it is said: "It is well understood that at the present time this principle is applied to the movement of many commodities. Generally, in its application, the raw material pays the local rate into the point of manufacture. When afterwards the manufactured product goes forward, it is transported upon a rate which would be applicable to the product had it originated in its manufactured state at the point where the raw material was received for transportation, whatever has been paid into the mill being accounted for in this final adjustment. Under this or some equivalent arrangement at the present time grain of all kind is milled and otherwise treated in transit; flour is blended; cotton is compressed; lumber is dressed, and perhaps otherwise manufactured; live stock is stopped off to test the market. It may be urged with much force that the act to regulate commerce does not sanction arrangements of this kind, and the commission, early in its history, intimated that such might finally be its conclusion. *Crews* v. *Richmond & D. R. Co.,* 1 Inters. Commerce Com. Rep., 401 (1 Inters. Com. Rep., 703). Such practices were, however, in use to a considerable extent at the time of the passage of the act, and since then they have become universal. To abrogate these privileges would be to confiscate thousands, and probably millions, of dollars in value, by rendering worthless industrial plants which have been constructed upon the faith of their continuation. Nor is it a forced construction of the statute to hold that, when the product goes forward to the point of consumption, it but completes the journey upon which it entered when the raw material was taken up. There can be no doubt that the application of this principle has cheapened the cost of transportation, and probably of manufacture."

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The legality of the principle of milling-in-transit arrangements being recognized, whether each special agreement will be upheld depends upon the varying circumstances attendant upon its making; but it cannot be affirmed that such an agreement as is here under consideration can be declared to be, by its very terms, violative of the laws prohibiting unlawful rebates. There is no difference in principle between the plan agreed upon by the contract and other milling-in-transit arrangements which have been sanctioned and enforced by the interstate commerce commission in the transportation of many different commodities. In the instant case the fact that the entire freight paid upon the raw cotton is credited upon subsequent shipments of manufactured product does not vary the principle which controls and on which the validity of such contracts is based, and the arrangement is as valid and as binding as if it was simply an agreement such as is customarily in force. Whether the raw material pays the local rate into the point of manufacture and afterwards the manufactured product pays a lower rate, calculated from point of original shipment, or whether the raw material pays the local rate, and this is credited in whole or in part upon the transportation of the manufactured products subsequently shipped, result is the same in principle; the one being, in the language of the interstate commerce commission, "an equivalent arrangement" of the other, and neither contravening the mandate of the law devised to protect shippers from unjust discrimination, whether the same arises from extortion or from unlawful rebates granted to a favored few. So long as there is no unjust discrimination, and no stipulation in the contract forbidding the carrier extending similar rates to all other shippers similarly situated, there is no express provision of law, and no sound reason arising out of public policy, which prohibits a carrier entering into a fair and equitable milling-in-transit arrangement with any of the numerous industries now operating under such plans. "If there is no unjust discrimination, an agreement by a railroad

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company that it will carry goods at a certain rate, and repay the shipper a part thereof as a rebate after the shipment, is not illegal, and the rebate may be recovered by the shipper in a proper case." Elliot on Railroads, sec. 1565; Rorer on Railroads, sec. 1375.

The clause in the contract by which a milling-in-transit arrangement is established between appellant and appellee does not seek to prevent the appellee effecting similar arrangements with all other patrons who may be or may hereafter be engaged in the same line of business. Nor does this contract, by any reasonable construction of its terms, necessarily work any unjust discrimination against any other cotton mills or dealers in cotton who may be located on appellee's line of railroad. It must be noted that the raw material pays full local rates into the place of manufacture, and the subsequent credit of such freight is only made upon shipments of manufactured product. If the raw material coming into the city of Laurel consigned to appellant should there be disposed of, either in its unmanufactured state or after it becomes the finished product of the mill, no portion of the local freight charges which have been paid upon such shipments at full tariff rates is credited to the appellant. The crediting of the freight paid is dependent upon whether the cotton is again shipped as manufactured product; so that, as to all shipments of raw cotton, the appellant fares neither better nor worse than do all others similarly engaged.

Before passing to the consideration of the next argument advanced by appellee in its assault upon the validity of this contract, it should be noted that sec. 6 of the interstate commerce act (U. S. Comp. St., 1901, p. 3156) and § 4292, Code 1892, do not deal with discriminations, as hereinbefore discussed. They were devised to secure uniformity of charges, by requiring all rates to be made public in a certain specified way, and then forbidding any change or deviation from the tariff so established. Sec. 6 of the interstate commerce act is fully complied with when the rates have been filed with the commission

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and the tariff of charges has been duly published. When once established and promulgated, the tariff cannot be deviated from, either by increase or reduction of rates, until another schedule of rates has been legally adopted in the manner prescribed in said section. The interstate commerce commission is without power to fix rates, but any person considering a rate unjust or discriminatory may attack same as provided by law. The power to pass upon the reasonableness of existing rates which is vested in the interstate commerce commission does not necessarily imply the right to prescribe rates. *Cincinnati, Etc., Ry. Co.* v. *Interstate Com. Com., supra.* Under sec. 6 of the interstate commerce act rates may be changed at any time upon compliance with its provisions, when the carrier "shall promptly notify said commission of all charges made in the same;" but under § 4292, Code 1892, a schedule, once approved, established, and promulgated as therein provided, can be varied only when "such change or deviation be first allowed by the commission." The statutes, both state and federal, now under review, were designed to insure publicity of established schedules of rates, so that every patron might easily protect himself against extortion or discrimination by seeing that the carrier did not collect any greater compensation for the transportation of passengers or property "than is specified in such published schedule of rates, fares, and charges as may at the time be in force."

With these preliminary observations as to the purpose and scope of the statutes requiring promulgation of rates, and viewing them in the light of their intent, we pass to the next contention presented on behalf of appellee.

It is urged that the contract in question is void because in direct violation of sec. 6 of the interstate commerce act and § 4292, Code 1892, in that it allows a rebate or reduction from the tariff of charges fixed or approved by the commission by a change in or deviation therefrom. There are two plain answers to this argument: (1) It does not appear from anything

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in the contract or in the declaration that, either by fixing the rates so as not to exceed those effective from Stonewall and Meridian or by entering into the millin-in-transit arrangement therein set out, were the rates fixed and approved by the interstate commerce commission or by the railroad commission of the state of Mississippi changed or deviated from in any particular. On the contrary, as the stipulations of the contract as to both the rates mentioned are valid in themselves, it may well be that these are the identical rates which have been filed with and published by the two commissions. Certain it is that in considering a contract legal in its terms, and violating no express statutory provision, and repugnant to no fundamental principle of public policy, a court is not authorized to indulge in the presumption that one party has ignored or violated the law, and thereby render the contract illegal and nonenforceable. If presumptions are to be indulged at all, they must be invoked in favor of the validity of a contract, and that the contracting parties have performed all legal obligations incumbent upon them, or necessary to effectuate the object which the contract had in view. Therefore, in the instant case, as the contract is, in its terms, valid and enforceable, provided the rates thereby fixed were submitted to the commissions as required by law, the presumption of law, if resort to presumptions was necessary, would be that such rates had been fixed and approved, and that the contract was no deviation therefrom, and consequently no violation of the law prohibiting all deviations. (2) Again, it does not appear that any rates governing this subject-matter had been submitted by the appellant to either commission at the date of the contract; and as the contract, as to rates, did not go into effect until the mill began the operating and shipment of manufactured product made, it does not follow that these rates, even if not in force at the date of the contract, were not subsequently submitted to the interstate commerce commission, or that the change in rates, if change it was, had not first been allowed by the Mississippi railroad commission before

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the rates were actually put in effect. This contract does not fall within that class expressly forbidden, except under certain exceptional circumstances, when it is incumbent upon the plaintiff to show that his contract falls within the exception. That character of contract is specially forbidden either by approved public policy or by express statute. This contract is not of that kind, for the reason that its terms in no wise transgress any provision of law; and if the appellee has itself complied with the legal duty imposed upon it in reference to the publication of its established schedule of rates, it is enforceable in all its terms.

The argument that the demurrers were properly sustained because the declaration failed to allege that the rates fixed in the contract sued on had been filed with the commission, or because it was not affirmatively shown that the consent of the Mississippi railroad commission had been first obtained, is unsound. The logical conclusion of the argument would be that as all rates are required to be filed with the proper commission, and then made public as its order may direct, a suit could be maintained on no contract for transportation of freight, without regard to the rates charged thereby, unless the plaintiff should allege that the carrier had discharged its duty in filing its schedule of charges, and then promulgating the same. The result of this would be to impose upon the plaintiff the burden of proving, in order to sustain a recovery, that the carrier had not violated the law or the order of the commission; the result being that the carrier would be enabled to defeat a valid contract by proof of its own sins of omission—a position manifestly untenable. It follows, therefore, that, in our judgment, the contract under review does not violate, by its terms or by any reasonable construction, any of the provisions of law invoked by the demurrers of appellee. It does not operate as a "discrimination" against any person or place, because it does not prevent the same rate being accorded to all. It does not unjustly discriminate in favor of appellant, because it grants it

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no lower rate than is or may be granted to other shippers. It does not grant any unlawful rebate, because a milling-in-transit arrangement is in itself legal, and sanctioned by the interstate commerce commission as the legitimate outgrowth of the building of new enterprises. It does not violate the provision of law prohibiting deviation from published rates, because it does not appear that it is such a deviation. It does not violate the prohibition against altering the published rates without the permission of the Mississippi railroad commission first obtained, because it does not appear that it is any alteration, or that said permission, if necessary, was not obtained. It might be further said in this connection, as strongly persuasive of the view here announced as to the validity and enforceability of the milling-in-transit arrangement agreed upon by the contract between appellant and appellee, that the appellee itself for nearly a year recognized the validity of this arrangement, and complied with the terms of the contract in this respect. Yet, if the argument now pressed upon us be sound, and if this arrangement was the allowance of an unlawful rebate prohibited by law, the Gulf & Ship Island Railroad Company is liable, by its own argument, to all the penalties imposed for a violation of the statutes in this regard. Here is a contract which, according to the facts admitted by the demurrer, the Gulf & Ship Island Railroad Company for eleven months complied with, at least in part; granting, so the declaration avers, this crediting of freight upon subsequent shipments of manufactured products, when such action on its part was, if the argument be sound, a flagrant violation of the law. This is a peculiar attitude for a litigant to occupy—to seek to annul as illegal a contract of its own making, and of which it has reaped the full benefit, by pleading guilty to repeated and long-continued violation of the law, thereby endeavoring to escape liability for its own breach of contract. The contract, upon its face, is valid and susceptible of enforcement. It may be that, in its practical effect, it works unfairly and constitutes an un-

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just discrimination. If so, it falls within the condemnation of the law. But whether or not this be its effect is a question, not of law, but purely of fact. *Texas & Pacific R. R. Co.* v. *Interstate Commerce Commission, supra.*

It may be that the contract is non-enforceable because an unauthorized deviation from established rates, but this is also a question of fact. We decide that the contract is not void upon its face, and decide nothing more.

The judgment of the circuit court is reversed, the demurrer overruled, and the cause remanded.

WESLEY DOBBS *v.* RICHARD W. CHANDLER, ADMINISTRATOR, ET AL.

1. ESTATE OF DECEDENTS. *Last illness. Nursing. Code* 1892, § 1965. *Life insurance. Exemption.*

A claim for nursing a decedent in his last illness is a debt against him, and the proceeds of a life insurance policy, exempt from the debts of the decedent under Code 1892, § 1965, is not chargeable therewith.

2. SAME. *Funeral expenses. Attorney's fees. Code* 1892, § 1957.

The funeral expenses of a decedent and an administrator's attorney's fee for the conduct of the administration are not debts against him, and the administrator of his estate may pay the same with the proceeds of a life insurance policy which is exempt from liability for his debts.

FROM the chancery court of, second district, Chickasaw county.

HON. HENRY L. MULDROW, Chancellor.

The questions in this case arose thus: Chandler, administrator of the estate of Lee W. Dobbs, deceased, collected five hundred dollars on a policy of life insurance on the life of the decedent, payable to the administrator of the insured. Wesley Dobbs, appellant, the sole heir of the decedent, petitioned

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Brief for appellant.

the court in which the administration was pending for a decree ordering the administrator to pay over to him the whole of the insurance money as exempt property, under Code 1892, § 1965, providing that the proceeds of a life insurance policy on the life of a decedent shall be exempt to the extent of five thousand dollars, etc. The administrator answered the petition showing that there was a necessity for the administration; that the funeral expenses of the decedent had been paid by him out of the fund in question, and claiming the right to retain a sufficient sum to pay his attorney's fee in the administration case.

One Elizabeth Kirsky, an appellee, also filed a petition in said cause against the administrator and appellant Dobbs, propounding a claim for nursing the decedent in his last illness, and praying for a decree ordering the administrator to pay her claim out of the insurance money. The estate of the decedent consisted only of said insurance fund.

From a decree approving the administrator's payment, out of the insurance money, of the funeral expenses, and authorizing him to pay his own attorney's fee and Miss Kirsky's bill for nursing the decedent, Wesley Dobbs, sole heir of the decedent, appealed to the supreme court.

L. P. Haley, and *Cowles Horton,* for appellant.

It is proved that the appellant, Wesley Dobbs, is the sole heir at law of Lee W. Dobbs, deceased, and that the proceeds of the life insurance, the money in question, is payable to the executor or administrator of the insured.

Appellant is proceeding under § 1965, Code 1892. This section says "the proceeds of a life insurance policy, not exceeding $5,000, payable to the executor or administrator of the insured, shall inure to the heirs or legatees, freed from all liability for the debts of the decedent."

The case at bar is governed by *Coates* v. *Worthy,* 72 Miss., 575.

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Brief for appellees.

The proceeds of a life insurance policy, under §§ 1964, 1965, Code 1892, goes to the heirs by purchase. *Cozine* v. *Grimes,* 76 Miss., 294. (See 300.)

R. W. Chandler, one of the appellees, had no right to take out letters of administration on the estate of Lee W. Dobbs, deceased, as Wesley Dobbs, an adult, was the sole heir.

"The exempt personal property is no part of the estate to be administered, but descends directly under the statute." *Whitley* v. *Stephenson,* 38 Miss., 113; *Holliday* v. *Holland,* 41 Miss., 528; *Wally* v. *Wally,* 41 Miss., 657; *Grafton* v. *Smith,* 66 Miss., 408.

As the money is freed from all liability for the debts of decedent, title to it vests in heir immediately upon death of insured. *Jones* v. *Patty,* 73 Miss., 179.

Expenses of funeral and last illness are a debt of the decedent. 8 Am. & Eng. Ency. Law (2d ed.), 1024; Sharwood's Blackstone (1878), Book 2, p. 511; Croswell's Executors and Administrators, sec. 126.

A. T. Stovall, for appellees.

As to the first proposition, that the proceeds of this insurance policy is subject to a charge of reasonable funeral expenses, I beg to say, funeral expense is not a debt of the decedent, and so § 1965, Code 1892, has no application, neither has the case of *Coates* v. *Worthy,* 72 Miss., 575.

Section 1939, Annotated Code 1892, shows that our law recognizes preference claims, and that they should be paid in full, if possible, and § 1944, Code 1892, shows that the preference claims are to be deducted from the corpus of the estate in the administrator's hands before he shall declare the *prorata* share of each creditor, and of course the same is true before he could declare the share of an heir, because the creditor comes before an heir, except as to exempt property; and when I say exempt property, I mean property or money exempt from the debts of the decedent, which of course does not in-

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clude expenses for the funeral and for the administration, because they are charges on the estate, incurred after decedent's death, and are inevitable and necessary in a Christian civilized government.

The decent burial of the dead is a matter in which the public have concern. It is against public health if it does not take place at all, and against a proper public sentiment that it should not take place with decency.

When the owner of some estate dies, the duty of the burial is upon the executor or administrator. From this duty springs a legal obligation, and from the obligation the law implies a promise to him, who, in the absence or neglect of the executor, not officiously, but in the necessity of the case, directs a burial, and incurs and pays such expense thereof as is reasonable. *Tugwell* v. *Heyman,* 3 Comp., 298; *Hatchett* v. *Curbows,* 59 Ala., 516; 8 Am. & Eng. Ency. Law, 1026, and authorities cited; *Donald* v. *McWhorter,* 44 Miss., 124; 2 Blackstone Com., 508; 2 Williams Exrs., 701; 3 Coke Inst., 202; *Fogg* v. *Holbrook,* 33 L. R. A., 660.

Now as to the second proposition, that the administrator is entitled to reasonable pay for his services in this behalf, this administration was necessary by reason of the very terms of the insurance policy, and, too, necessary by reason of the rules and regulations governing benevolent organizations, as well as the law of the land, so the administrator was entitled to reasonable compensation. Code 1892, § 1956.

Now as to the proposition that the administrator was entitled to a reasonable allowance for attorney's fee, this record itself demonstrates the necessity of employing counsel, and he is entitled to a reasonable allowance for this purpose. Annotated Code 1892, § 1957.

WHITFIELD, C. J., delivered the opinion of the court.

The funeral expenses are not a debt of the decedent within the meaning of § 1965, Code 1892. The considerations which

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support this view and demonstrate the correctness of the chancellor's decree in allowing the administrator to pay the funeral expenses out of the $500 insurance money are obvious. The administrator was also entitled to a reasonable attorney's fee, but the claim for nurse's hire was a debt of the decedent, and ought not to have been taken out of this insurance money.

The decree is affirmed in all things except as to the claim of Elizabeth Kirsky for nurse's hire, which was a debt of decedent. As to that it is reversed, and the cause remanded to be proceeded with in accordance with this opinion.

THOMAS A. BOWLES v. GEORGE G. DEAN.

1. LANDLORD AND TENANT. *Tenant holding over. Expiration of term. Summary proceeding to remove. Code* 1892, §§ 2547, 2548. *Affidavit.*

An affidavit in a proceeding by a landlord to remove a tenant holding over after the expiration of his term, under Code 1892, § 2547, providing a speedy remedy for such case, is defective if it fail to allege facts, as required by Code 1892, § 2548, from which the court may determine that the relation of landlord and tenant existed between the parties and that the term has expired.

2. SAME. *Amendment. Code* 1892, § 717.

Such a proceeding should not be dismissed because of a defective affidavit, unless the landlord declines to amend, as he has a right to do under Code 1892, § 717, authorizing amendments in pleadings and proceedings.

3. SAME. *Appeal to circuit court. Code* 1892, § 2552. *Counter affidavit. Issue made in circuit court.*

The defendant in such a proceeding may, upon appeal, file his counter affidavit (Code 1892, § 2552) in the circuit court. *Harvey v. Clark*, 81 Miss., 166.

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Brief for appellant.

FROM the circuit court of Leflore county.

HON. A. McC. KIMBROUGH, Judge.

Dean, the appellee, was plaintiff, and Bowles, appellant, defendant in the court below. From a judgment in plaintiff's favor the defendant appealed to the supreme court. The opinion states the facts.

Gwin & Mounger, for appellant.

The old common law remedies having been found too slow, the statute of 11 Geo., 11., sec. 19, was passed providing this remedy and the statute of Mississippi, under which this proceeding is brought (§ § 2547–2548, Code 1892), and the similar statutes in the other states of the union are based upon this statute. The statute is in derogation of the common law, and hence must be strictly construed. Unless the jurisdiction appears upon the face of the record, in the affidavit, the proceeding is *coram non judice* and void. Every jurisdictional fact must appear in the affidavit. 2 McAdam, Landlord & Tenant, sec. 298; 2 Taylor, Landlord & Tenant (9th ed.), secs. 721 and 721*a*.

By sec. 2548 of code the landlord is required to "make oath or affirmation of the facts which, according to the last preceding section, authorize the removal of the tenant," etc.

By the statute the right is given to landlords and lessors only. The conventional relation of landlord and tenant must be shown to exist between the parties. It is not sufficient that such relation has arisen by operation of law. Where the entry was under claim of title hostile to the landlord, the proceeding cannot be sustained. So where the possession is under an agreement to purchase and after default in payment, or in the case of a grantor retaining possession after the time stipulated for his possession to be retained in his deed to the purchaser.

The facts should be set out so that the court, the magistrate issuing the summons, can judge whether the parties come within the statutory description. 12 Ency. Pl. & Pr., 878-880;

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Fowler v. *Roe,* 25 N. J. L., 549 (1 Dutch., 549); *Conley* v. *Conley,* 78 Wis., 665; *People* v. *Matthews,* 38 N. Y., 451; *Cardin* v. *Standly,* 20 Ga., 105.

The affidavit of the plaintiff in the case at bar is defective not only in not showing the facts of the relation of landlord and tenant, or the facts upon which the affiant's conclusion that this relation exists is based, but it is defective in the other particulars.

The affidavit in the case at bar is defective in another particular in that it purports to have been made by an agent, "J. T. Dean, agt. for G. G. Dean," but it nowhere makes affiant swear that he is such agent, or authorized to institute the proceeding or make the affidavit.

"Where the affidavit is made by an agent of the landlord, it is not sufficient that the affiant be simply described as the agent, but the fact of agency must be directly sworn to." *Cunningham* v. *Goelet,* 4 Den. (N. Y), 71; *People* v. *Johnson,* 1 Thomp. & Co. (N. Y.), 578.

Even if the defendant's motion to dismiss the cause because of the defective affidavit should have been overruled, still the circuit court should have allowed the defendant to file his affidavit denying the facts alleged in the plaintiff's affidavit upon which the summons issued.

Williamson & Stone, for appellee.

The expression used in the affidavit "tenant for a part of the year 1903" shows beyond question that the term expired at least with the year 1903, and the tenant was certainly holding over after the expiration of that term on the 6th day of January, 1904, the date of the affidavit. The affidavit follows literally the wording of the first paragraph of § 2547, Code 1892, when only a substantial compliance is necessary.

CALHOON, J., delivered the opinion of the court.

So far as this record shows, the proceedings were begun under Code 1892, § 2547 *et seq.,* by an affidavit before a

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justice of the peace, showing that there personally appeared "J. T. Dean, agt. for G. G. Dean, who makes oath that T. A. Bowles, a tenant for a part of the year 1903, of G. G. Dean, for a certain lot of land described as [describing it], holds over and continues in possession of said premises after the expiration of his term, without permission of the landlord, G. G. Dean; wherefore he prays for a writ to issue requiring the said T. A. Bowles to remove from said premises, or to show cause why possession of same should not be delivered to said G. G. Dean." This is signed "J. T. Dean," and sworn to by him. This affidavit is defective in not fulfilling the requirements of Code 1892, § 2548, which are that it shall show "the facts which, according to the last preceding section, authorize the removal of the tenant, . . . and that the necessary notice has been given to terminate such tenancy." However, we do not think it defective on the ground that it does not show that the three days' notice in writing requiring payment, under the second clause of the preceding section, had been given. This proceeding is not under that clause, but under the first, as to a tenant holding over after the expiration of his term, and this requires no notice, as does the second, which is for default in the payment of the rent. The defect in the affidavit is in the failing to exhibit facts to enable the court to determine from their statement that there was the relation of landlord and tenant, that there was a term of lease, and what that term was, with its beginning and ending. But we refuse to hold that, because these matters appear only inferentially and without particularization, the circuit court erred in not sustaining absolutely a motion to dismiss "the affidavit and this cause." This should follow only if the landlord declined to amend; and we think he might amend, under Code 1892, § 717, so as to bring the merits to trial. The proceedings in the court of the justice of the peace do not show on their face any objection made to the sufficiency of the affidavit, but show merely the appearance of the parties, that

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argument was heard on evidence adduced, and judgment for plaintiff, Dean. Mr. Bowles appealed to the circuit court, where he made the motion to dismiss, which we have referred to and passed upon. He then made a motion to be allowed to file in that court for the first time his affidavit denying the facts set out in plaintiff's affidavit, accompanying the motion with an affidavit showing good reason why it was not filed in the justice of the peace court. His motion was overruled. This was error. *Harvey* v. *Clark,* 81 Miss., 166 (32 South., 906).

Reversed and remanded.

WILLIAM G. COCKE *v.* WESTERN UNION TELEGRAPH COMPANY.

1. TELEGRAPH COMPANY. *Disclosure of message. Punitive damages.*

The thoughtless disclosure by a telegraph operator of the contents of a message addressed to the plaintiff, relating to a public matter which otherwise would have become generally known in a very short time, does not justify the imposition of punitive damages on the telegraph company.

2. SAME. *Statutory penalty. Code* 1892, § 1301.

Code 1892, § 1301, imposing a penalty on employes of telegraph companies for divulging the contents of a message, has no application to an action against the company for damages resulting from the publication of a message.

FROM the circuit court of Tate county.

HON. J. B. BOOTHE, Judge.

Cocke, the appellant, was plaintiff, and the telegraph company, appellee, defendant in the court below. From a judgment in plaintiff's favor against defendant for nominal damages, one dollar, the plaintiff appealed to the supreme court.

The opinion states the facts.

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Brief for appellant.

J. F. Dean, for appellant.

Plaintiff's duty was to pay for the transmission of the telegram, which he did. Plaintiff's rights were to have the message received, transmitted, and delivered by the telegraph company, and to have the contents of the message kept secret. Defendant's right was to receive just compensation for the message, and its duties were to receive, transmit, and deliver, and to keep inviolate the secrecy of the telegram. It is as much the duty of the telegraph company to keep the contents of the message from every one but the sendee as it is to transmit or deliver the telegram to him. It has been decided by so many courts so many times that actual damages may be recovered for mental suffering where no pecuniary loss is shown, that I deem it useless to discuss that proposition.

It has been decided in this state in *Telegraph Co.* v. *Watson,* 82 Miss., 101; s. c., 33 South. Rep., 76; see also *Young* v. *W. U. Tel. Co.,* 3 Am. R. R. & Corp. Cases, 493; *Chapman* v. *W. U. Tel. Co.,* 3 Am. R. R. & Corp. Cases, 193; in each of which cases and notes to them this subject is exhaustively treated. I refer also to an Iowa case in 57 Am. St. Rep., 294, in which the same doctrine is discussed and in which the evidence necessary to sustain a verdict is also discussed.

That the telegram was made public is absolutely undisputed. That it was made public in Greenville is shown beyond question. It was not made public by Mr. Cocke or his mother or sister. It was then *ex rei necessitate* made public by the telegraph company. If made public by the telegraph company, it was through the negligence, willful or otherwise, of its agents. If the contents of the message were made public, the telegraph company negligently and willfully violated its contract, and is liable for all damages resulting proximately therefrom. The disclosure was the proximate cause of the mental suffering and the defendant company is liable. *Rogers* v. *Telegraph Co.,* 68 Miss., 748.

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Brief for appellee.

If injury to the feelings be an element of damage in slander, libel, and breach of promise cases, it seems to us it should equally be so considered in cases of this character. If not, then most grievous wrong may often be inflicted with impunity, legal insult added to outrage by the parties, by offering one cent or the cost of the telegram as compensation to the injured party.

If any wrong was committed in the case, it was not from mere negligence, but was a willful wrong; and damages for mental suffering are allowed in Mississippi where the wrong is willful. *Telegraph Co.* v. *Rogers,* 68 Miss., 748, which is followed and amplified by *Telegraph Co.* v. *Watson,* 82 Miss., 101; s. c., 33 South. Rep., 76.

In *Storm* v. *Green,* 51 Miss., 109, the court says: "The rule on the subject of exemplary damages has been several times repeated in this court, and has assumed a definite form. Where willfulness, fraud, malice, or oppression evincing a disregard of the rights of others, characterized the wrongful act complained of, then the jury are not limited to the mere value of the property and the interest, but may rightfully consider the circumstances of aggravation and increase the damages, so as to enforce a respect for the rights of others and as a punishment to the willful trespasser." Referring to *Whitfield* v. *Whitfield,* 40 Miss., 352; *Briscoe* v. *McElween,* 43 Miss., 569, and *Jamison* v. *Moon,* 43 Miss., 602. In the latter case it was said to be proper to consider whether the trespass was "committed with a high hand, wantonly, needlessly, oppressively." The jury may also take into account the "mortified sensibilities and reputation of the party and the evil example to the public."

The same doctrine here announced is stated in *Railroad* v. *Scurr,* 59 Miss., 461.

Harris & Powell, for appellee.

We must not be understood as contending that a telegraph company may not be liable in damages for the wrongful dis-

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closure of the contents of a message, though it is true that the decisions on this point are exceedingly meager. Our statute, Code 1892, § 1301, provides a punishment for any clerk, operator, messenger, or other employee who willfully divulges the contents of a message to any one except the person for whom it is intended. No penalty is imposed, however, on the company.

This, however, is not an action under that statute, but is a claim for damages, punitive damages, from the company itself for an alleged willful and malicious, wanton and reckless disclosure of the message in question, and our contention is that under the peculiar facts disclosed in this case the plaintiff is only entitled to nominal damages, if to any at all. There is no pretense that the plaintiff sustained any actual damage.

In the very nature of things, Cocke could not have been damaged by the disclosure of the contents of this message. While in fact it was a message between individuals, it was not in fact a private message, nor a message in regard to his private business. It was the announcement of the result of a public judicial act by the justices of the highest tribunal in the land, a matter essentially public, in no way secret; a matter in which, as alleged in the declaration, the public at large were very much interested; indeed, a matter that the public at large were entitled to know as much about as Cocke. It was in regard to a public matter in which the state of Mississippi was interested; a matter to which the state was a party; a matter affecting the administration of public justices in this state; a matter which might be said to be so essentially public in its nature as to be presumably known as soon as the justices to whom Mr. Dean had made his application had acted upon it. It was a matter which was bound to be made public. It was a matter which any press reporter could have telegraphed to the end of the world had he seen fit to do so, and a matter which Cocke had no right to keep secret, and which was not, as we say, in the nature of a private message.

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Brief for appellee.

The question is, Is the appellant entitled from the facts disclosed in this record to punitive damages? There can be but one answer to this question. The circumstances attending the alleged disclosure of the purport of this message are fully set forth in the record, and there is not the slightest pretense of malice or willful wrong.

While it is true there was a disclosure knowingly made and intentionally made of the message, yet it was not a willful disclosure as that term is technically used and understood in the law, when used as a basis for inflicting punishment.

To hold that the telegraph company is liable for punitive damages in this case would be tantamount in holding that it is liable in punitive damages for a mere disclosure, however innocently made, and however harmless in its results, and regardless of the character of the message. No principle of law can be found to support such a proposition.

This court has distinctly and clearly defined the meaning of willful wrong. In the case of *Vicksburg Company* v. *Marlett,* 78 Miss., 874, this court says:

"For a willful wrong that gives a cause of action for the imposition of exemplary damages must be denoted by wrongful act, done with the knowledge of its wrongfulness. By reason of the negligence of the conductor, who gave the unpunched transfer to Marlette, he was wrong in being ejected from the car, but the wrong cannot be characterized as a willful or intentional wrong."

In numerous cases this court has held that exemplary damages are not recoverable, unless the act complained of is characterized by malice, recklessness, rudeness, oppression, or willful wrong. *Forsee* v. *Railroad Co.,* 63 Miss., 66; *Railroad Co.* v. *Scurr,* 59 Miss., 456; *Railroad Co.* v. *Green,* 52 Miss., 779; *Railroad Co.* v. *Pearson,* 80 Miss., 26; *Railroad Co.* v. *Moore,* 79 Miss., 766.

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Opinion of the court.

CALHOON, J., delivered the opinion of the court.

Mr. Cocke's declaration asks punitive damages because the telegraph company, through its operators and agents, disclosed the contents of his dispatch. The court below held the jury to nominal damages, and they accordingly returned a verdict for $1, which was his actual outlay. The claim for vindictive damages is based solely on mental distress, grief, mortification, and humiliation because of the publicity given his message. He appeals to this court.

This case must be decided, of course, without reference to and independently of § 1301, Code 1902, which denounces a penalty against any person, being the employee of any telegraph company, who divulges the contents of a message. It must, of course, be determined by the law applicable to the violation of all contracts, which may or may not entitle to smart money, as the facts may warrant. Involved in every contract for the transmission of a telegraphic dispatch is an obligation on the part of the transmitting company to keep its contents secret from the world. This obligation was not observed in the case before us, and the message was divulged by one or two of the employees of appellee. This gave a right of action beyond question to recover actual damages. Whether it warrants exemplary damages or not must be determined by the facts of the record in the light of the settled principle that compensation is the rule and punishment the exception, justified only by circumstances of outrage, malice, oppression, or willful wrong, or, in cases suited to its application, such wanton, reckless, or grossly careless conduct as is equivalent to a bad intent to do hurt to body or feelings. It is certain in this case—incontrovertible—that there was no evil intent, no malice, no thought of harm, or that anybody's feelings would be hurt. On the contrary, it is plain that the operator thoughtlessly divulged the contents of the message to a warm friend of appellant, as he himself was, from the kindest motives. In fact, as we think, we are practically called on to decide whether or

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not the mere revealment of the contents of a dispatch justifies punitive damages. The facts, taken most strongly for appellant, are these: Appellant's brother had been convicted of murder and sentenced to death, and this court had affirmed his case on appeal. It was a case of great notoriety in the state because of the high standing and great social influence of his family and its extensive connections. Tremendous efforts were made for a commutation of his sentence to imprisonment for life, but they were of no avail with the governor of Mississippi. The chief justice of this court, with the approval of his associates, refused a writ of error to the Supreme Court of the United States. The day of execution was near at hand. One of his attorneys went to Narragansett Pier, where was one—perhaps two—of the judges of the United States Supreme Court, to ask for a writ of error to that court. This journey of counsel, and the purpose of it, were well known to the public, and appeared as news in the public prints. There was no secrecy or attempted secrecy about it. The governor had refused a respite to enlarge the time for that journey, there being time to make it without respite, but with not much margin. Before leaving it was arranged between the counsel and appellant that the former should wire the latter the result to Senatobia, Miss., and arrangement was also made, if appellant was not at Senatobia, that the message should be forwarded to him at Greenville, Miss., care Avenue Hotel. The journey was unsuccessful. The writ of error was refused. The counsel at once sent to appellant, at Senatobia, a dispatch in these words: "Two judges here. One refused writ. Think other will also." This was dated July 19th. The execution was fixed for July 22d. Appellant had many friends in Senatobia, who sympathized with him in his distress, and very much desired his brother's pardon. Among these was the operator at appellee's office there, and he, in violation of law and of the obligation involved in the contract of transmission, disclosed the contents of the message to another, or others, of the friends of appellant, who was not

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there, but had gone to Greenville. The information, of course, the case and the object of the journey being notorious, soon became generally known. The message was forwarded to Greenville, and reached there on July 20th, and while the messenger boy was taking it to Avenue Hotel, he met a young gentleman, who was a son of one of the counsel for the condemned man, and opened the envelope and read to him the message. There is no claim that the disclosure caused any actual damage, or had the slightest effect on the course of events. The sole claim for smart money is set out in the following language of the declaration: "By reason of willful, wanton, gross, reckless, and malicious wrong of defendants, plaintiff was greatly grieved, mortified, and humiliated, and made to suffer great mental distress, to his hurt and damage in the sum of fifty thousand dollars; and therefore he sues." The defendants are the telegraph company and its Senatobia operator. The effect of the disclosure on the mind and feelings of appellant appears in his own testimony as follows: "Q. What effect, if any, did the fact that the telegram was made public before it reached you have on your mind? A. I don't like very much for my private business to be made public property, and everybody knew of the contents of my telegram. It was very humiliating to me. Q. What effect did it have on your feelings generally? A. It had that effect—very humiliating; and I don't like for people to know my affairs. It was my private business, and it wasn't to be made public to anybody. Q. What effect did it have on your mind and feelings when you found it was known in Jackson, Miss.? A. I was hurt very much about its being known." We decline to hold that exemplary damages are recoverable under the facts of this case. If he suffered mental distress, grief, mortification, or humiliation, he should not have suffered it, if a normal man, and courts should only decide upon the assumption of normal conditions. This was a message relating to a public matter, necessarily to be general property in a few hours, and any one must be

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Statement of the case.

unnaturally thin-skinned to be wounded by its premature revealment to the extent of being entitled to punitory damages. This is true, though many cases might arise warranting the assessment of such damages.

Affirmed.

RICHARD F. TATE ET AL. v. BOARD OF LEVEE COMMISSIONERS FOR THE YAZOO-MISSISSIPPI DELTA.

PRIVILEGE TAXES. *Cotton seed oil mills. Laws* 1898, *ch.* 5, *p.* 14. *Repeal. Laws* 1894, *ch.* 78, *p.* 77.

Laws 1898, ch. 5, p. 14, relieving cotton-seed oil mills having a capital of less than thirty thousand dollars from a privilege tax, relates only to such tax for state purposes, and does not include the tax for levee purposes, imposed by Laws 1894, ch. 78, p. 77.

FROM the circuit court of Tunica county.

HON. SAMUEL C. COOK, Judge.

The board of levee commissioners, appellee, was plaintiff, and Tate and another, appellants, were defendants in the court below. From a judgment in plaintiff's favor defendants appealed to the supreme court.

The suit was brought to recover the sum of $200, being double the amount of privilege license tax claimed by plaintiff for two years, from January 1, 1901, to January 1, 1903. The case was tried in the circuit court on an agreed statement of facts before the judge, a jury having been waived. The facts as agreed on are, substantially, as follows: Defendants (appellants) operated and ran a cotton seed oil mill in Tunica county, Miss., which is within the district of said levee board, from January 1, 1897, up to the time the suit was brought, and up to the 1st of January, 1903; that the machinery and buildings of the said oil mill represented a capital of a little less than $30,000; and the privilege taxes sued for were not paid.

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Brief for appellee.

F. A. Montgomery, for appellant.

Sec. 2, ch. 78, Laws 1894, levies a privilege tax, for levee purposes, on each cotton seed oil mill, where the buildings and machinery represent a capital of not more than $30,000—to wit, $50.

The laws of 1894, page 23, levy a state privilege tax of $100 on each oil mill where the buildings and machinery represent a capital of not more than $30,000.

On same where the capital exceeds $30,000, but not over $50,000 and less than $75,000, $175, etc.

In 1898 the privilege tax law was revised by chapter 5 of the laws of that year, and on page 14 of those acts a tax is levied on cotton seed oil mills where the capital exceeds $30,000, but none where the capital does not exceed that amount, thereby repealing clearly the law of 1894, which levied a state privilege tax on oil mills where the capital did not exceed $30,000, and the question in this case is, Does the act of 1898, chapter 5, repeal the privilege for levee purposes on oil mills where the capital does not exceed $30,000?

Sec. 107 of ch. 5, laws of 1898, was intended to apply to the levee board, and to repeal the levee privilege tax where the privilege was not taxed by the state. That section is as follows:

"Sec. 107. Restriction on Taxation of Privileges: The privilege tax as above provided shall not be taxed by the board of supervisors of any county; nor shall they be subject to taxation, by any municipality, to an amount exceeding fifty per centum of the tax specified, unless expressly provided by law," etc.

Sec. 109 of the same law provides:

"That all acts in conflict with this act shall be, and they are hereby, repealed," etc.

J. L. Lowe, for appellee.

There is a broad distinction between municipalities and levee districts, recognized in sec. 104 of the state constitution, which

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emphatically denominates the two to be in different and separate classes, wherein the said fundamental lawmakers declared that, "In civil causes the statute of limitation should not run against the state, or any subdivision, or municipal corporation, thereof."

It is apparent from the language used that a municipal corporation is as different from a subdivision of the state as said corporation is from the state, so far as the classification thereof is concerned. In the case of *Adams* v. *Illinois C. R. R. Co.*, 71 Miss., 752, the court stated that the Yazoo-Mississippi Delta Levee District was a subdivision of the state, and the court was then construing this very sec. 104 of the state constitution, and to make said sec. 107, acts 1898, apply in this case, or any similar act restrictive of the privilege taxing power, the said restrictive act would have to specifically name the Yazoo-Mississippi Delta Levee Board.

But, on the other hand, we insist that the levee board, by the act of 1894, page 77, was not only delegated the power to collect privilege taxes, as sued for in this case, from parties who operated oil mills of this class, but that the tax itself was levied by the legislature by the act.

CALHOON, J., delivered the opinion of the court.

On February 28, 1884 (Laws 1884, p. 140, ch. 168), the appellee was incorporated and authorized to issue bonds. The only scheme provided by the act of incorporation to pay the bonds is in sec. 13 of it, by which the legislature itself, for the board, "hereby levied and assessed" a tax of thirteen mills on the dollar of all property, real and personal, in the front, and nine mills on the dollar in the back, counties. This tax was, of course, independent of the current and ordinary taxation for state and county purposes, and not subject to its annual fluctuations. On March 16, 1886 (Laws 1886, p. 100, ch. 39), the act of incorporation was amended, by which amendment, in sec. 3 (page 102) of the act, the scheme of revenue for the

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board to pay the bonds was broadened, and a tax on privileges was "hereby levied and assessed" on a great variety of things named, but cotton seed oil mills were not included among the subjects of privilege taxation. In the legislation of the years 1884 and 1886, when both these acts were passed, separate laws provided for privilege taxes for general purposes distinct from those for levee purposes. We now come to Code 1892, ch. 108, § 3412, which is the same as § 587, Code 1880, and which expressly restricts the powers of boards of surpervisors or municipalities to tax the privileges in the chapter of which it is a part, and which is for state purposes, more than 50 per cent of the state tax on privileges. It is to be noted that the chapter includes cotton seed oil mills, and puts a privilege tax on them, where their capital does not exceed $30,000, of $100, and is silent as to any tax on oil mills for levee purposes. Coming now to the acts of 1894, we find chapter 29, page 21, passed February 10th of that year, which is for state purposes, taxing, on page 23, cotton seed oil mills with a capital not exceeding $30,000, the sum of $100. But we also find chapter 78, page 77, of the same session, passed February 9th of that year, repealing sec. 3 of the beforementioned act of 1886, and substituting for it an enlarged list of privilege taxes for the levee board, and on page 81 fixing a tax for it on cotton seed oil mills of $50 where the capital does not exceed $30,000. These acts are clearly independent each of the other. The acts of 1898 do not deal at all with the taxes for the board of levee commissioners, but present chapter 5, which on page 14 taxes cotton seed oil mills only where the capital exceeds $30,000, and leaves those of less value untaxed, but this chapter is for state purposes; and sec. 107 (page 33) of it expressly restricts county and municipal boards from exceeding 50 per cent of the taxation imposed by that chapter. Appellants' case depends on their contention that, since the act of 1898 does not tax oil mills of not exceeding $30,000 value, in which class

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Syllabus.

theirs is, it practically repealed the levee tax of 1894. We do not concur in this view. The two things are separate and independent, and the levee tax stands unrepealed.

Affirmed.

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IDA WALKER v. ELISHA B. WILLIAMS ET AL.

1. PARTITION. *Jurisdiction. Code* 1892, § 3101. *Claims. Payment of liens. Taxes, use and occupation.*

In a partition suit, under Code 1892, § 3101, extending the jurisdiction of the chancery court in such cases, it is proper:

(*a*) To adjust all equities between the co-tenants relating to the common property and all questions arising between them from the discharge of liens and payment of taxes;

(*b*) To vacate a purchase by one of the co-tenants, under a mortgage upon the joint property, reimbursing the purchaser for money paid in discharging the lien;

(*c*) To reimburse one of the co-tenants for taxes paid by him on the joint property;

(*d*) To charge one of the co-tenants for the use and occupation of the joint property beyond the extent of his individual interest therein.

2. SAME. *Husband and wife.*

That the husband of a co-tenant occupied the joint estate with her, and that he, under the law, is the recognized head of the family, did not limit her liability for compensation to the other co-tenants for her use and occupation of the estate.

3. SAME. *Code* 1892, § 3119. *Solicitor's fee.*

The power to allow a solictor fee in suits for partition, under Code 1892, § 3119, regulating the subject, should be exercised with caution and confined as nearly as possible to those cases in which there is no contest and no necessity for the defendants to have counsel of their own. When there is a real controversy and propriety in defendants being represented by their own counsel they should not be required to contribute to pay counsel of their adversary. *Hoffman* v. *Smith*, 61 Miss., 544; *Neblett* v. *Neblett*, 70 Miss., 572.

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Statement of the case.

FROM the chancery court of Lauderdale county.

HON. STONE DEAVOURS, Chancellor.

Ida Walker, appellant, was complainant, and Williams and others, appellees, defendants in the court below, in the supplemental proceedings out of which the litigation sprang. The facts were these:

One John T. Ball died intestate in 1890, leaving some lands in the city of Meridian. His heirs were his son, A. H. Ball, two daughters, and a grandson. One of the daughters—Lula—married a Mr. Wilkins, and the other married a Mr. Allien. In May, 1891, Mrs. Wilkins, Mrs. Allien, and E. B. Williams, the grandson, filed a bill for the sale of the real property for division of the proceeds. A. H. Ball, who was made defendant to the bill, answered the bill, admitting its allegations, and joined in the prayer for a sale of the lands. The prayer of the bill was granted, and a commissioner appointed to make the sale. The commissioner sold the land, but at such a low price that the court refused to confirm the sale, and ordered it resold. This was in 1893, and nothing more was done in the matter until October 6, 1899. A. H. Ball was married to Ida Walker, the appellant here, and after their marriage they lived in a residence on part of this property for four years, and during that time she lent A. H. Ball, her husband, $1,700 and took a deed of trust on his undivided interest in his father's estate, embracing the lands in controversy. This deed of trust was foreclosed in 1894, and the property was bought in by appellant. Appellant, the wife of A. H. Ball, afterwards sued and obtained a divorce from her husband, and took her maiden name, Ida Walker. In October, 1899, she filed a supplemental bill, upon which this litigation arose, reciting the unexecuted decree for the sale of the real property of the John T. Ball estate, and setting out a description of the property and her title which she acquired under the trustee's sale, and prayed that the decree be modified so as to adjudge her a distributee, and that another commissioner be appointed to sell the property

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for partition. The appellees, E. B. Williams and Lula B. Wilkins and Anna Allien, were made parties defendant to the supplemental bill, which they answered. They admitted that the decree of sale existed, and all the averments in reference to it; admitted appellant's title to one-fourth interest of the estate, but alleged that all the real property had been sold and conveyed by the heirs after the decree for the sale except lot 3 and block 8 of Ball's survey; that block 8, on which the Ball residence stood, had been by the heirs, including appellant, incumbered by a deed of trust to secure a loan of $800 from John Kamper in 1896, and that in 1899 it had been foreclosed, and that appellee Williams had bought it. Appellant then filed an amended supplemental bill, in which she charged that the sale of block 8 under the deed of trust and the purchase by E. B. Williams was fraudulent and void, and asked that it be set aside, and the property be decreed subject to partition. Defendants answered this bill, setting up a claim for taxes, and claimed rent from complainant from the date she acquired an interest in the estate until she left it in 1898, she having lived in the residence with her husband, A. H. Ball, during this time. There was a decree entered setting aside the sale of block 8 made under the Kamper deed of trust, which was purchased by E. B. Williams, and the property decreed subject to sale for partition, and a commissioner was appointed to sell the land. The charges for the use and occupation of the residence, the claim for taxes advanced and the amount of the Kamper note, were referred to a master to state the amount of each separately, with interest thereon, and he was instructed to report to the court, and to charge appellant for the four years' use and occupation of the residence, with six per centum per annum, and to charge the defendant Williams with rent at fifteen dollars per month for the time he occupied it, with six per centum. The land was sold, and bought by E. B. Williams. Complainant filed objections to her interest in the estate being charged with any part of the Kamper debt, and any part of the taxes, and

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Brief for appellant.

for any use and occupation of the land, or any part of the costs. The court overruled these objections. There was a final decree charging the estate with the repayment of the Kamper debt, and the taxes that had been paid, and the costs of the court, charging complainant for use and occupation of the residence for the time she occupied it with her husband, and also charging E. B. Williams for use and occupation of the residence, and refusing to allow any attorney's fees to complainant. From that decree complainant appealed to the supreme court.

Hardy & Cook, for appellant.

The fact that a co-tenant in possession bought property at a trustee's sale for $906 that is worth $4,500, having concealed from a nonresident co-tenant all knowledge of the time and place of sale, and after it was made failed to advise his co-tenant of the fact, failed to offer the privilege of contributing her share of the purchase money, and so to retain her interest, is unmistakable evidence of a fraudulent purpose, especially so when he sets up his purchase of so valuable an estate for such an insignificant sum in bar of the claim of his nonresident co-tenant. The chancellor took this view of it, for he set aside the sale under the Kamper deed of trust and declared it void.

"Every one who engages in a fraudulent scheme forfeits all right to protection either at law or in equity." The reason of the rule is given by the court in the following language: "This would be to hold out inducements to engage in schemes of fraud, as nothing could be lost by a failure to effectuate the entire plan." *Stovall* v. *Farmers & Merchants Bank of Memphis,* opinion of Chief Justice Sharkey, 8 Smed. & M., 316.

Williams was not entitled, therefore, under this rule of law, to have the money paid out refunded to him. *McLoskey* v. *Gordon,* 26 Miss., 273.

The charge against the estate for taxes of 1896, 1897, 1898, 1899, and 1900, with interest amounting to $808.20, and that this sum be paid to appellees to reimburse them for money

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Brief for appellant.

advanced by them with which to pay the taxes, was glaring error. Sec. 1930 of the code makes it the duty of the administrator to pay the taxes.

The next error complained of is the charge against appellant of the sum of $992.82 for use and occupation of the residence from July, 1894, to June, 1898.

The general rule on the subject of domicile during coverture is stated, 10 Am. & Eng. Ency. Law (2d ed.), 32, as follows:

"By marriage a woman, whether a minor or an adult, loses her domicile and acquires that of her husband, and that during coverture the domicile of the wife continues to be that of the husband and changes with his."

In the note to this text a vast number of authorities are cited, embracing English, Canadian, and American cases.

The following Mississippi authorities are cited: *Hairston* v. *Hairston*, 27 Miss., 704; *Bate* v. *Incisa*, 59 Miss., 513; *Suter* v. *Suter*, 72 Miss., 345.

The great apostle Paul said in his letter to the church at Ephesus: "Wives, submit yourselves unto your husbands, as unto the Lord. For the husband is the head of the wife, even as Christ is the head of the church." (Eph. v. 22, 23.)

The next error complained of is that the court charged the enormous bill of costs, amounting to $128, to the estate, when it should have been charged to the appellees, as they are responsible for the litigation.

Appellant proposed an amicable partition which was entirely practicable without the intervention of the court, as all the parties are of full age; but this was declined, doubtless for the simple reason that they claimed the title to the homestead, which constitutes nearly the entire estate left, by adverse title, acquired at the fraudulent sale under the Kamper deed of trust.

The court erred in overruling appellant's motion for the allowance of reasonable attorney's fees. Sec. 3119 of the code provides that the court may allow a reasonable solicitor's fee in all cases of partition to the complainant or to the solicitor

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conducting the suit, to be taxed as a common charge on all the interests.

Alexander & Alexander, and *Miller & Baskin,* for appellees.

The sale under the Kamper trust deed having been set aside because the purchaser, being one of the grantors and a co-tenant, was disqualified to purchase, the trust deed was of course revived, and, being still a lien, it was a charge in favor of Williams, who had paid the amount due as his bid, and thus prevented foreclosure. Williams released the land from the burden of the trust deed, and on the settling of the equities he was properly reimbursed.

The taxes were properly allowed as a charge on the land. What difference does it make as to which of defendants paid them? They were paid; complainant did not pay them.

It was clearly right to charge complainants with one-fourth of the taxes. None of defendants are complaining as between themselves. It matters not to complainant which of defendants paid the taxes.

The question of domicile has no place in this case. A. H. Ball was in possession until 1894. He then conveyed to his wife, and the possession after that will of course be referred to her. Possession as between husband and wife living together on land will be referred to the one having the legal title. *Hill* v. *Nash,* 73 Miss., 849.

TRULY, J., delivered the opinion of the court.

Section 3101, Code 1892, provides that chancery courts in which suits for partition are instituted shall have power, in order to prevent multiplicity of suits, to "adjust the equities between and determine all claims of the several co-tenants." It was proper, therefore, for the court in the instant case to inquire into and decide all controverted equities, and make a final adjustment of all claims arising out of and concerning the property sought to be partitioned. It is an established principle

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of equity that tenants in common sustain toward each other such a relation of trust as forbids one to do any act hostile to the interest of the others, or to acquire by any means any title to the common property adverse to the claim of his co-tenants. Hence it was proper for the court to annul and hold for naught the sale under the Kamper trust deed, whereby appellee, E. B. Williams, sought to acquire title to the common property. This title, so acquired, inured to the benefit of all those who were jointly interested in the property. However, as the Kamper trust deed constituted a lien on the entire property sought to be partitioned, and rested equally on the interest of each co-tenant, it was proper to charge the common estate with the money expended in payment of this debt. While it is true that one co-tenant cannot fraudulently pay off a lien or purchase at a sale thereunder, so as to obtain any title adverse to his co-tenants, yet he is entitled to be reimbursed the money advanced to discharge the common burden, because the payment thereof was necessary for the protection of the common estate. Therefore the money expended by appellees in the liquidation of the Kamper note and lien was properly charged against the estate. *Burns* v. *Dreyfus,* 69 Miss., 213 (11 South., 107; 30 Am. St. Rep., 539); *Harrison* v. *Harrison,* 56 Miss., 174. Making an application of the same principle, the money advanced to pay the taxes on the common estate was also properly charged against it. Under previous adjudications, state, county, and municipal taxes are recognized as legal burdens imposed on property, the discharge of which being for the preservation of the estate and for the benefit of all concerned, the ones paying the same have a lien therefor on the share of their co-tenants for repayment. The master reported that the appellees had paid the taxes, and the chancellor so found. *Davidson* v. *Wallace,* 53 Miss., 475; *Allen* v. *Poole,* 54 Miss., 323.

It was proper to charge the interest of appellant in the property sold for partition with a reasonable sum for the use and occupation thereof. It is a well-settled equitable principle

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that each co-tenant has a lien upon the interest of every other for the value of the use and occupation of the joint estate beyond such tenant's individual interest therein, and also any sum which may have been collected and appropriated by such tenant as revenues arising therefrom. This is expressly held in *Medford* v. *Frazier,* 58 Miss., 241, and is reaffirmed as the correct doctrine to which full scope and effect is to be given in all proper cases in *Burns* v. *Dreyfus, supra,* where the court, through Cooper, J., says: "We recognize to its full extent the equitable principle that in the partition of lands held in common the court will, in the division of the property—or of its proceeds, if indivisible, and therefore sold for partition—do full justice between the co-tenants by directing accounts to be taken of receipts and disbursements by them, and will so apportion the fund as to do complete equity." The fact that the husband of appellant also occupied the premises, and that he, under the law, is the recognized head of the family, in no wise limits appellant's liability to render compensation to her other co-tenants for her use and occupation of the joint estate. The property was occupied by appellant as tenant in possession by virtue and strength of her own title, and the question of legal domicile does not affect the rights of her co-tenants. From a careful inspection of this record we are unable to see that appellant has been denied any of her rights by the final decree herein. Upon her, as tenant in common with the appellees, there rested, under the law, the duty to pay her proportion of the lien which by joint action of all concerned was placed on the property, and the taxes which, by operation of law, were annually levied. Inasmuch as she failed to pay her proportion at the time it fell due, and it was paid by her co-tenants, she is now equitably bound to refund to them the money which they expended for her benefit, and for the protection of her interest in the common estate. The final decree herein requires her to do nothing more.

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Nor was it error in the court to decline to allow a fee to the solicitor of complainant. This case falls expressly within the prohibition against such award contained in the opinions of this court in *Neblett* v. *Neblett,* 70 Miss., 572 (12 South., 598); *Hoffman* v. *Smith,* 61 Miss., 544.

Affirmed.

ISAAC R. ANDERSON ET AL. *v.* RICHARD MOORE.

EJECTMENT. *Possession. Intruder. Paper title. Code* 1892, § 2434.

Possession of land for ten years gives the possessor and those claiming under him a sufficient title to justify a recovery in ejectment against a mere intruder who has no title. (See Code 1892, § 2434.)

FROM the circuit court of Jones county.

HON. JOHN R. ENOCHS, Judge.

Anderson and others, appellants, were plaintiffs, and Moore, appellee, was defendant in the court below. From a judgment for defendant plaintiffs appealed to the supreme court.

The suit was an action of ejectment brought by plaintiffs, the heirs of Isaac Anderson, deceased, against Richard Moore for the S. ½ of N. E. 1-4 of S. W. 1-4, section 34, township 8, range 12 W., less two acres. Moore defended for one acre, more or less, in the northwest corner of said tract, "being the lot or parcel of land on which his house is situated." Pending the trial he amended this plea as shown in the opinion of the court. On the trial plaintiff introduced a patent to the land in controversy and other lands to J. E. Welborn from the United States, dated July 2, 1860; a deed from J. E. Welborn and wife to V. A. Collins, dated March 12, 1869. This deed is in due form, but the certificate of acknowledgment, while reciting that it had been signed, failed to recite that it had been delivered. Defendant objected to the introduction of this deed be-

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Brief for appellants.

cause the acknowledgment was defective in not reciting that it was delivered. The objection was overruled. Plaintiff then introduced a deed from V. A. Collins to Henry Pate to the land, and a deed from the heirs of Henry Pate to Isaac Anderson, their ancestor, and proved the death of Henry Pate, that the grantors in the deed to Isaac Anderson were his heirs, and that Isaac Anderson was dead and plaintiffs his heirs. Plaintiffs then introduced one Speed, who testified that he was a surveyor, and that he surveyed the land in controversy, and that the house in which defendant lived was on the east and west center line dividing the 40 acres, two-thirds of it north and one-third south of the line, and that the house, which was known as the "Nagle house," was very nearly midway between the two ends of said line, and was about 200 yards from the acre in the S. W. corner of the S. ½ of the N. E. 1-4. Plaintiffs then proved the rental value and rested. Defendant renewed the motion to strike out the deed from J. E. Welborn and wife to V. A. Collins because the acknowledgment was defective. This motion was then sustained, to which plaintiffs excepted. Plaintiffs then introduced J. H. Bynum, who testified that V. A. Collins was in possession of this land in 1871, and that Collins was in possession of it and exercising ownership over it for at least ten or twelve years, and probably longer. Plaintiffs then rested. The court then gave a peremptory instruction to find for defendant. Defendant contended that the deed from Welborn and wife to Collins was void because the deed was made in 1869, and was consequently governed by the provisions of the code of 1857, under which an acknowledgment was an essential part of the conveyance by a married woman.

Hardy & Arnold, and *Brame & Brame,* for appellants.

Although the acknowledgment was defective because the certificate did not recite that the grantor acknowledged that he had delivered the deed, this affected only its recordability. The

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deed being valid in every respect, and there being no objection to the signature of the grantor or to the form of the instrument, it was a perfectly good deed, and when it was shown that the grantee went into possession under it and held under the deed until he conveyed to Pate, which was in 1888, the plaintiffs' chain of title was complete.

Actual possession by the ancestor of part of a tract of land with claim of title to the whole and proof of heirship is sufficient as against one who shows no title. *Spears* v. *Burton,* 31 Miss., 547.

Ordinarily, proof of possession accompanied by claim of title is *prima facie* evidence of seizin in fee and puts the opposite party on proof of his right. *Heard* v. *Baird,* 40 Miss., 793; *Hicks* v. *Steigleman,* 49 Miss., 377; *Kerr* v. *Farish,* 52 Miss., 101; *Lum* v. *Reed,* 53 Miss., 73.

Nor was it necessary to show that Collins had actual possession of all parts of the land embraced in his deed. Possession of a portion of a tract of land described in a deed is presumptive or constructive possession of the entire tract within the calls of the deed. This is specially true in a case where the defendant does not offer any deed to overcome this presumption. *Welborn* v. *Anderson,* 37 Miss., 155; *Ryan* v. *Ry. Co.,* 62 Miss., 162; *Brougher* v. *Stone,* 72 Miss., 647.

If the deed of Collins had never been acknowledged at all, this would not affect the plaintiffs' title. The deed itself being produced and possession under it being shown, the title would be complete, and no question could arise except one involving the rights of a purchaser from Welborn, and no question of that kind is presented in this case. The defendant showed no deed at all and did not claim to have purchased from Welborn or any prior owner without notice of the deed to Collins, and if such question had been presented, it would have been unavailing because of the undisputed fact that Collins was in possession, claiming title to the land described in his deed.

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Opinion of the court.

Shannon & Street, for appellee.

A plaintiff in ejectment must stand or fall upon the strength or weakness of his own title, without reference to the weakness of defendant's title. He cannot succeed except by showing a perfect title in himself against all the world. *Lum* v. *Reed,* 53 Miss., 73.

Now, applying this test, is a plaintiff entitled to recover when his chain of title is broken by a void deed? It requires the deed of Welborn and wife to Collins to complete the chain of title in appellants. If that deed is void, of course no title passed by it, and appellants have no title, because the only kind of title they attempted to assert was by deed, and if a single deed in the whole chain is void, their title must fail. Title cannot be conveyed unless there is a delivery of the deed. *Jelks* v. *Barrett,* 52 Miss., 315.

There is nothing about the deed under consideration to show that it was delivered. The makers did not acknowledge that they delivered it. It was not entitled to be recorded, and if recorded, was not constructive notice. *Buntyn* v. *Compress Co.,* 63 Miss., 94. A deed by a married woman which is not properly acknowledged is void. *Willis* v. *Gattman,* 53 Miss., 721.

The testimony of the witness Bynum, with reference to the character of Collins' possession, is too vague and indefinite to be of importance.

WHITFIELD, C. J., delivered the opinion of the court.

The defendant in this action of ejectment brought to recover 18 acres of land, defended for but 1 acre. In the original plea he claimed that this acre was in the N. W. corner of the S. ½ of the N. E. 1-4 of the S. W. 1-4. When the evidence was concluded, upon the suggestion of the learned circuit judge, the plea was amended so as to locate this acre simply in the S. ½ of the N. W. 1-4 of the S. W. 1-4, in order to conform to the proof, which proof showed that the house claimed by defendant

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was situated two-thirds north of the south boundary of the 18-acre tract, and one-third below it. The only pretense of claim set up by defendant under any one was an asserted claim under one Maxwell. But the testimony of Mr. Speed, the surveyor, shows plainly that what Richard Moore claimed was "in the two forks of the road," and that the land and house, which were "in the two forks of the road," constituted the one-third above referred to as lying south of the south boundary line of the 18-acre tract. In other words, the Maxwell claim is not in the said 18-acre tract at all. So far as the land sued for, therefore, is concerned, the defendant set up no claim under any one, no paper title of any sort, not even title by adverse possession. He stood merely on the alleged failure of plaintiffs' title. The testimony shows, further, that Collins went into possession of this land, and held possession of it for twelve years or more, prior to defendant's alleged three years' possession of the Nagle house and land, claiming and exercising ownership over the same; that the Nagle house was not built during these twelve years when Collins was in possession; and, further, that Welborn and wife never occupied this land as a homestead. The title to this land was in the husband, not the wife; and hence the authorities cited by counsel for appellee are not in point, so far as the wife's failure to acknowledge that she sealed and delivered the deed is concerned. It is true, the husband also failed to acknowledge that he sealed and delivered the deed, and there is no proof of delivery of the deed, as the act of the husband, except what may be inferred from the fact that the appellants, the remote alienees of Welborn, had possession of the deed, and offered it in evidence on this trial. But without reference to the deed from Welborn and wife, the appellant, on the testimony, was entitled to recover, on his possession alone, against the defendant, who occupied the position of an intruder or trespasser. Possession, such as is shown by this testimony, was enough to warrant recovery, without reference to paper title at all.

Reversed and remanded.

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Statement of the case.

SHELL SOUTHWORTH ET AL. v. AARON BROWNLOW ET AL.

1. MARRIED WOMEN. *Coverture. Emancipation. Code* 1871, § 2323. *Code* 1880, § 1167. *Constitution* 1890, *sec.* 94. *Code* 1892, § 2289.

Code 1871, § 2323, providing that no act of the husband should affect the wife's interest in land, ceased to be operative when married women were wholly emancipated from all disability on account of coverture. Code 1880, § 1167; Constitution 1890, sec. 94; Code 1892, § 2289.

2. ESTATES OF DECEDENTS. *Contract for sale of land. Specific performance.*

Where the administrator of a decedent who contracted to convey lands is not a party to the suit, and complainant admits that the decedent was without title, specific performance of the contract should not be decreed.

FROM the chancery court of, second district, Carroll county.

HON. ADAM M. BYRD, Chancellor.

Brownlow and others, appellees, were complainants, and Mrs. Southworth and others, appellants, were defendants in the court below. From a decree in complainants' favor the defendants appealed to the supreme court.

The bill alleged that in February, 1880, W. B. Prince, the husband of one of the defendants, Mrs. Prince, and the father of the other defendant, Mrs. Southworth, owned certain described lands, and on that date executed a bond for title, in which he agreed to convey to complainants the lands upon their paying him $2,602 in six annual payments; that during the life of Prince they paid him large sums of money; that in 1893 Prince died, leaving a will, in which he devised the said lands to defendant, Mrs. Prince, and that complainants made large payments to the agents of Mrs. Prince, more than the balance due on the lands; that Mrs. Southworth claimed to be the owner of the lands, but complainants knew nothing of the nature of her title; that complainants, upon the execution

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Statement of the case.

of the bond for title, entered upon the lands, but the bond for title did not describe the lands intended to be conveyed by it, and that the wrong description was used by the mutual mistake of complainants and W. B. Prince, and that it was intended to convey the land of which they were then in possession; that in December, 1900, Mrs. Southworth instituted an unlawful entry and detainer suit against complainants to oust them from the possession of said lands; that said suit was still pending in the circuit court. The prayer of the bill was for an injunction restraining defendant from further prosecuting said suit, for an accounting, and for an order requiring defendants to execute to complainants a deed conveying the lands described in the bill according to the terms of the bond for title as reformed, the reformation of which they prayed. Defendants answered, denying that the lands belonged to W. B. Prince in 1880, at the time of the execution of the bond for title to complainants, or at any time before or since that time, but alleged that the lands belonged to defendant, Mrs. Prince, by virtue of the deed of William Terry and wife to her in 1869. They alleged that Mrs. Prince sold the lands in January, 1897, to Mrs. Southworth. Defendants denied that they were in any way liable to account for the money paid to W. B. Prince during his lifetime; that they had ever recognized the title of complainants as purchasers. They admitted the suit of unlawful entry and detainer in the circuit court, and charged that complainants had attorned to them for rents of the lands, and that since the death of W. B. Prince complainants had been in possession of said lands as their tenants by virtue of a contract. They made their answer a cross-bill charging that the claim of complainants was a cloud upon their title, and asking that it be canceled. Complainants answered the cross-bill, admitting the deed of William Terry and his wife to trustees for Mrs. Prince, and that she conveyed to Mrs. Southworth, as stated in the answer, but set up as a defense that Mrs. Prince was estopped from claiming under said deed by the fact that she

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Brief for appellants.

knew and understood that complainants were contracting with W. B. Prince under the idea and belief that he was the legal owner of the lands; and they further set up title in themselves to said lands by virtue of their open, notorious, and adverse possession of the lands for over twenty years. They denied that they ever attorned to defendants, or in any way recognized their title. Upon these pleadings considerable proof was taken, and a final decree rendered dismissing the cross-bill of the defendants, and granting the relief sought by the complainants, and directing that the bond for title to complainants be reformed, and that defendants execute a deed to complainants conveying the land described in the bond for title as reformed, and perpetuating the injunction.

Southworth, Hughston & McEachern, for appellants.

Section 2323, Code 1871, which was effective at the time of the execution of the bond for title, governs rights accruing in February, 1880, of such heirs or other person thereto. *Carter* v. *Carter,* 14 Smed. & M., 59. Therefore the bond for title did not affect the rights of the wife of W. B. Prince to the possession of any of her realty. The possession of appellees, then, was subject to the right of lawful entry on the part of Mrs. Prince after the death of W. B. Prince, her husband. His death occurred in January, 1893. This right of entry was a vested right from the date of possession under the title bond, because there was a present fixed right of future enjoyment. 4 Kent Com., 202. No subsequent legislation could destroy this right. *Lyon* v. *Knott,* 26 Miss., 548; *Cameron* v. *Cameron,* 29 Miss., 112; *Walton* v. *Olive,* 29 Miss., 270; *Baygents* v. *Beard,* 41 Miss., 531; *Musgrove* v. *Railroad Co.,* 50 Miss., 677.

The law gave the appellant, Mrs. Prince, the lawful right of entry after the death of her husband, and the statute of limitation by adverse possession could not begin to run until January, 1893, the date of his death. The mere ability to sue does

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Brief for appellees.

not impose the obligation to do so. *North* v. *James,* 61 Miss., 761.

Under § 1881, Code 1892, the unpaid purchase money is declared to be assets of the estate to be administered, and stands chargeable with all just debts and funeral expenses of the deceased and the expense of settling the estate. The bill shows that the entire purchase money had not been paid at the time of the death of W. B. Prince; consequently the notes belonged to the administration of his estate, and not to Mrs. Prince, until the settlement of the affairs of his estate, which fact the appellants set up in their cross-bill.

Before it could be ascertained how much was due on said notes at the time of the death of W. B. Prince an accounting was necessary, and strict proof on competent evidence would be required under the law before the purchasers would be allowed any credit on the notes. Section 523, Code 1892. Appellees show no such accounting, and they seek none against the executor or administrator of said estate, who would be a proper party to this proceeding. If they should be allowed to establish claims or defenses against the heirs of said estate instead of against the executors, in matters properly belonging to the administration, no different rule should be required and the heirs should not be held to a stricter account in such matters than would the executor.

Tackett & Smith, for appellees.

The proof demonstrates beyond doubt that appellees have been in the open, notorious, continued, and uninterrupted possession of the land since 1880, claiming it as their own against every one except W. B. Prince; and, moreover, the law is that a vendee in an executory contract to convey land holds the same adversely to the claims of third parties other than the vendor. 1 Am. & Eng. Ency. Law (2d ed.), 800; 1 Cyc., 1049; *Graham* v. *Warren,* 81 Miss., 330.

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Opinion of the court.

And, besides, all questions of fact necessary to be decided by the court below were decided in favor of appellees, and will not be reviewed in this court.

It is contended, however, by appellants that the bar of the statute of limitation is not yet complete by reason of § 2323, Code 1871. This section is taken from the statute of 32 Henry VIII, ch. 28 (3 Blackstone, star paging 171; 2 Bacon's Abridg., star paging 91 and 92), and even before its enactment was a part of our common law (*Miller* v. *Miller,* 33 Am. Dec., 157; *Hill* v. *Nash,* 73 Miss., 860, 861), so that no new rights were conferred by it upon married women.

Under the 32 of Henry VIII, ch. 28, and the common law as construed in this country, a deed made by the husband during coverture of land owned by the wife, purporting to convey the fee, and under which the grantee entered into possession, operated as a disseizin of the wife after her discoverture; the statute of limitation beginning to run against her from the time of her discoverture.

A married woman becomes discovert, within the meaning of the statute of limitation, at the time disabilities of coverture are removed by law. *Lowe* v. *Fox,* 15 G. B. Div., 668, cited in 9 Am. & Eng. Ency. Law (2d ed.), 472, note 3.

Mrs. Prince, therefore, became discovert and the statute of limitation commenced to run against her on the 1st day of November, A.D. 1880. Code 1880, §§ 2, 1167, and 2759; *Bridgeforth* v. *Payne,* 62 Miss., 777; *Hambrick* v. *Jones,* 64 Miss., 240.

Argued orally by *E. V. Hughston,* for appellants.

WHITFIELD, C. J., delivered the opinion of the court.

The proof clearly shows that appellees have been in open, notorious, and uninterrupted possession of the land since the attempted sale of it to them by W. Berry Prince, the ancestor of appellant, in 1880. Since the 1st of November, 1880, when

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the revised code of 1880 went into effect, abolishing coverture, with all its incidents and disabilities, § 2323, Code 1871, ceased to operate. 9 Am. & Eng. Ency. Law (2d ed.), 472, note 3; *Miller* v. *Miller*, 33 Am. Dec., 157; *Bridgeforth* v. *Payne*, 62 Miss., 777; *Bradstreet* v. *City of Jackson*, 81 Miss., 233 (32 South., 999). The case of *Hill* v. *Nash*, 73 Miss., 849 (19 S. W., 707), does not contravene this view, for the statute of limitation was obviated in that case by reason of the existence of the estate by curtesy in the husband. Since coverture prevented, at common law, a married woman from suing, therefore, it was not right that any act of the husband should operate a disseizin of the wife as to any lands to which she had title, or in any way prejudice or affect her rights thereto. Since, therefore, the whole object of the said § 2323, Code 1871, was to prevent the wife from being prejudiced because of her coverture, it follows that, when coverture was wholly abolished, there was no longer any need for said statute. When the system of coverture fell, the statute (§ 2323, Code 1871) fell with it. More than ten years elapsed from the 1st of November, 1880, to the assertion in this suit of appellants' alleged rights under the deed to trustees for Mrs. Prince from her father. The appellees therefore have a perfect title by adverse possession. It was error in the court below to decree specific performance of the contract made by Mr. Prince, who had no title, and whose administrator was not made a party to the bill; but this error does not necessitate reversal. The chancellor found all the facts for the appellees, especially the fact that they had more than paid for the land; but appellees have taken no cross appeal with a view to recover such overpayment.

We reverse and vacate so much of the decree as decrees specific performance, but the substantial part of the decree, which declares the appellees to be the owners of the lands involved, and perpetuates the injunction, is affirmed.

So ordered.

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Brief for appellant.

WILLIAM H. BRANTLEY v. THOMAS E. BATSON ET AL.

HOMESTEADS. *Double claim.*

A defendant in execution after abandoning his homestead in one tract of land and securing the same in another tract, cannot again defeat the execution by selling the last mentioned tract and returning to the first one claiming a homestead therein.

FROM the chancery court of, second district, Perry county.

HON. STONE DEAVOURS, Chancellor.

Brantley, the appellant, was complainant, and Batson and others, the appellees, were defendants in the court below. From a decree in defendants' favor the complainant appealed to the supreme court.

The facts sufficiently appear from the opinion of the court.

Ellis & Sullivan, for appellant.

The complainant was not actually occupying the lot in litigation at the time of the levy of the executions, but he moved on it and impressed it with the homestead character before the day of sale. This he could do under the authority of *Trotter* v. *Dobbs,* 38 Miss., 198; *Irwin* v. *Lewis,* 50 Miss., 363; *Letchford* v. *Cary,* 52 Miss., 791; *Jones* v. *Hart,* 62 Miss., 13; and *Dulion* v. *Harkness,* 80 Miss., 8. The complainant comes clearly within the provisions of § 1971, Code 1892. He meets every requirement of the law in reference to holding property exempt from execution. He is a citizen of the state; he is a householder and head of a family; he resides on the lot with his family, and it is worth less than two thousand dollars in value. He owns no other place or residence. But it will be contended that he is estopped from asserting his claim to the lot as exempt from these executions. We do not think the doctrine of estoppel can be invoked to prevent one from asserting his right of exemption of the homestead from seizure and sale under exe-

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cution or attachment. To apply this doctrine would be equivalent to declaring that one, under certain conditions, could forfeit the right to hold his homestead free from execution or attachment, although he meets all the requirements of the law as to citizenship, being the head of a family, a householder, and actually residing on the property with his family. It would be equivalent to outlawing, not only the head of the family, but the family also, for the conduct of the head of the family, for which they were in no way responsible. *Hinds* v. *Morgan,* 75 Miss., 509.

It will be contended that the complainant asserted his exemption to the place in the country, and when it was released from the levy he sold it, and cannot now claim his exemption in the town property. The evidence shows a *bona fide* sale of the country place, and when the complainant sold it and moved from it, it ceased to be his homestead. On what principle can it be said that he is not entitled to acquire another homestead?

Richie v. *Duke,* 70 Miss., 66, is not authority for the ruling of the court below in the case at bar.

Stevens & Stevens, for appellees.

We refer this court to the following authorities, which we consider conclusive and as settling the question at issue—viz., can appellant, with two places and with judgment liens against his entire property and with executions in the hands of the officer, move from one place to the other and claim in succession each as his *bona fide* home? *Rutherford* v. *Jamieson,* 65 Miss., 219; *Richie* v. *Duke,* 70 Miss., 66, and authorities there cited—to wit, *Stone* v. *Darnell,* 20 Tex., 11; *Woodhall* v. *Rudd,* 41 *Ib.,* 375; *Willis* v. *Mathewson,* 46 *Ib.,* 478; Thompson on Homesteads, paragraphs 225, 319, 419, 648, 856; also 15 Am. & Eng. Ency. Law, 660 and 661.

CALHOON, J., delivered the opinion of the court.

Mr. Brantley lived on a lot he owned in town, where he had lived for two years. He had other property four miles dis-

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Opinion of the court.

tant in the country, on which he had not lived for two years. Executions on judgments against him were levied on the country property, and a week or two before the day of sale he moved out, and forbade the sale, as it was about to be made, claiming the country land as being his exempt homested. Therefore the sale was not made, but at once the creditors got alias writs of execution, and levied on the town property, and had it advertised for sale, when Mr. Brantley made sale and conveyance of his country property, moved back on his tow nproperty, and seeks to enjoin the sale of that on the ground that it is his homestead. All this occurred within about thirty days. If the claim of Duke in *Richie* v. *Duke*, 70 Miss., 69 (12 South., 208), was, as the court said, "preposterous and unallowable," what shall we say of this case in all its features? We have not undertaken to set out all the facts. In *Rutherford* v. *Jamieson*, 65 Miss., 221 (3 South., 413), the court says: "Homestead rights are to be protected according to law, but are not to be perverted into instruments of fraud."

Affirmed.

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Syllabus.

YOUNG B. BOYD *v.* STATE OF MISSISSIPPI.

1. CRIMINAL LAW. *Murder. Poisoning. Evidence. Declarations res jestae. Symptoms of suffering.*

In a prosecution for murder by poisoning the declarations of the deceased describing the symptoms of her then present sufferings are admissible in evidence, but a narration of the symptoms of past sufferings is inadmissible.

2. SAME. *Chemical experiments.*

On a prosecution for murder by poisoning with arsenic where a physician, as a state's witness, produced several bottles which he testified contained the medicines which he had prescribed for the deceased during her last illness and showed the effects of arsenic on each of them, changing the color of the liquids, it was error to permit the state to prove that defendant, during the last illness of deceased, gave her a punctured orange, which she refused to eat, from which juice oozed of a color like one of the medicines with which arsenic had been mixed, in the absence of evidence showing that the orange contained poison or that any of the medicine taken by deceased had been changed in color.

3. SAME.

In a prosecution for murder by poisoning, it having been shown that deceased had been taking certain dyspepsia medicine and that the bottle containing the medicine had been kept on a shelf, in a room to which a number of persons had access, it was error to permit a witness to testify that the deceased told him, in the absence of the defendant, where she had placed the bottle of medicine, that when witness looked for it there it had been moved, and that it was afterwards found on another shelf, hidden by other bottles, having in it a liquid containing poison and of a different color from the medicine.

4. SAME.

Where the theory of the state was that defendant had poisoned his deceased wife in order that he might continue illicit relations with another woman, and there was no evidence whatever tending to show that such woman was in any way implicated in administering any poison to deceased, an instruction that the

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Statement of the case.

jury should convict if they believed beyond a reasonable doubt that defendant mixed the poison, "or procured it to be done by another," was erroneous.

5. SAME.

Where the theory of the state was that defendant had poisoned deceased, it was proper to permit evidence that defendant had disputed the statement of a witness at the preliminary examination to the effect that defendant had purchased poison from witness.

6. SAME.

On a prosecution for murder it was error to admit evidence that accused did not testify before the justice who conducted the preliminary examination.

7. SAME.

On a prosecution for murder it was error to permit a witness for the state to testify that he had testified to the same facts at the preliminary examination.

8. SAME. *Dying declaration.*

In a prosecution for murder by poisoning, one of the theories of the defense being that deceased poisoned herself, a statement by the deceased, made while in extremis and knowing that she was about to die, in answer to an inquiry by her attending physician as to whether she had taken anything into her stomach, in these words, "The Lord is my witness, I have taken nothing except what you gave me," is admissible as a dying declaration.

9. SAME.

In such case it is inadmissible to prove that, just before the dying declaration was made, the physician told deceased that her husband, the defendant, was under suspicion, and that she should state whether she had so taken anything.

FROM the circuit court of Copiah county.

HON. ROBERT POWELL, Judge.

Boyd, appellant, was tried and convicted of murder by poisoning his wife, and appealed to the supreme court. The opinion states the case.

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Brief for appellant.

M. S. McNeil, and *A. C. McNair,* for appellant.

The evidence is not sufficient to sustain a conviction. There is nothing in the testimony, in the first place, to show, beyond a reasonable doubt, that the good woman died of poison. But if that was shown, it is not shown that Boyd was the criminal agent. The testimony of those conversant with the true inwardness of the relation between Boyd and his wife discloses that Boyd's conduct and treatment of his wife was kind. In this case no outbreaks of abuse and quarreling are displayed. While it is not proved, the fact, if it be a fact, that he may have been infatuated with Mrs. Artman is not a sufficient motive, on the showing in his case, for the poisoning of his wife. Neither is the fact that there was a life policy on the life of Mrs. Boyd, in his favor, for $1,000, sufficient. All such testimony only tended to inflame and mislead the jury, and was under the facts in this case highly prejudicial to the defendant. The testimony of the witnesses as to the conduct and relations of Boyd and Mrs. Artman was admitted to show motive on part of Boyd for poisoning his wife. This is true, too, as to the orange, and the policy of insurance on her life in Boyd's favor. This testimony was wholly inadmissible on this line, and was highly hurtful to defendant. The test as to the admissibility of evidence to show motive is: "Does the testimony fairly tend to raise an inference in favor of the fact proposed to be proved?" If it does, it is admissible; otherwise, it is not. 15 Am. & Eng. Ency. Law (1st ed.), 93.

The alleged dying declaration was inadmissible. It consisted partly of the statement of Dr. Dampeer that the deceased was suffering from a poison, and that her husband was suspected of administering the poison to her. Dying declarations are the statements of the party dying, and not of some one else. Dampeer's statement that she was suffering from a poison was an opinion of his, an assumption of one of the vital facts in the case, and in connection with his statement, that her husband was suspected of poisoning her, largely contributed to, if it

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Brief for appellee.

did not procure, the conviction. The statement of Mrs. Boyd in response to Dr. Dampeer's suggestion that she was poisoned by her husband, that "the Lord was her witness that she had taken nothing except what you have given me," was not in the nature of a dying declaration. But if it were, the circumstance attending it rendered it inadmissible. Its only tendency and effect was to prejudice the defendant's case in the minds of the jury. If the appeal depended on this alone, the case should be reversed.

William Williams, attorney-general, *R. N. Miller,* and *R. B. Mayes,* for appellee.

Looking at the assignments of error by appellant, it seems they are all purely formal and do not indicate any particular point relied on. We deem it unnecessary to notice but two of them; the first is as to the admissibility of the evidence as to Boyd's intimacy with Mrs. Artman, and also Mrs. Boyd's jealousy. To show motive, which is one link (not necessary, it is true), but always a proper link when it can be established, and an important one in every case of circumstantial evidence, in this kind of case, to show motive for murder, it is always admissible to show relations of the parties; and in order to do this the evidence of hostile relations with his wife on Boyd's part was proper. It was also proper to show his fondness for the Artman woman, between himself and whom stood his wife, and that he would be anxious for her removal on this account. The following citations of case law on this subject are deemed sufficient—viz.: *Webb* v. *State,* 73 Miss., 456; *Weyrich* v. *People,* 89 Ill., 98; *People* v. *Scott,* 153 N. Y., 46; *State* v. *Duestrow,* 137 Me., 266; *State* v. *Chase,* 68 Vt., 405; *Brunson* v. *State,* 124 Ala., 37; *Fraser* v. *State,* 55 Ga., 325 (112 Mich., 291); Underhill Cr. Ev., secs. 90 and 323; *State* v. *Seymore,* 94 Iowa, 699; *Phillips* v. *State,* 62 Ark., 119; *Painter* v. *People,* 147 Ill., 444; *People* v. *Colvin,* 118 Cal., 349; *People* v. *Buchanan,* 145 N. Y., 1; *Boyle* v.

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Brief for appellee.

State, 61 Wis., 441; *Siberry* v. *State,* 149 Ind., 684; *Thiede* v. *Utah Ter.,* 159 U. S., 510; *People* v. *Decker,* 157 N. Y., 186; Underhill Cr. Ev., sec. 333; *Spears* v. *State,* 56 S. W. R., 347; *State* v. *Reid,* 50 La., 990 (24 S. W. R., 131); *State* v. *Larkin,* 11 Nev., 314; *Cue* v. *Com.,* 78 Pa. St., 185; *People* v. *Benham,* 160 N. Y., 402 (55 N. E. R., 11); Cr. Law & Pro., by Hughes, secs 138 to 142; *Miller* v. *State,* 68 Miss., 221; *State* v. *Reed,* 53 Kan., 767 (42 Am. St. R., 323); *State* v. *Watkins,* 9 Conn., 47 (21 Am. Dec., 712). This last leading case on very point.

Second, as to the dying declarations of Mrs. Boyd. A dying declaration is the "statement of the victim of crime of any circumstance, which, if the party were living, would be relevant and admissible on the issue as to the cause or manner of such victim's death." We need cite only the case of *Lipscomb* v. *State,* 75 Miss., 559, in support of this definition and of the admissibility of Mrs. Boyd's declaration.

All the preliminaries were shown—that is, that she was fully conscious of impending, immediate dissolution, had so stated, that she was going to die, and had made all her dispositions to that solemn end, and she then said: "As the Lord is my witness, I took nothing except what you (the doctor) gave me."

This was the expression not of a mere opinion, but of a relevant fact. Boyd's defense hinted at in his conversation with Dr. Dampeer was suicide, and of course it was a very pertinent fact to know if she had taken poison voluntarily. If she had not died and Boyd were on trial for assault and battery with intent to murder by giving her poison, of course it would have been relevant and proper to ask her if she had herself taken poison. This is the test as held in the Lipscomb case, *supra.* She was told Boyd was suspected of her murder, and asked to exonerate him if she had taken poison voluntarily, and her testimony in the form of dying declaration was entirely proper.

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Opinion of the court.

Argued orally by *A. C. McNair,* and *M. S. McNeil,* for appellant, and by *R. N. Miller,* and *William Williams,* attorney-general, for the appellee.

TRULY, J., delivered the opinion of the court.

On the night of the 29th of November, 1902, Mrs. Annie Boyd died of acute gastritis. An autopsy disclosed the fact, according to the testimony of the analytical chemist, that her death was superinduced by arsenical poisoning. Appellant, the husband of the deceased, was indicted for her murder, and upon trial was convicted, sentenced to the penitentiary for life, and from that judgment prosecutes this appeal.

The testimony adduced at the trial was purely circumstantial. The theory upon which the prosecution proceeded was that the appellant had poisoned his wife through a desire to effect her death so that he might procure the proceeds of a policy of insurance on her life and continue an illicit intimacy with one Susan Artman. The following state of facts was developed by the testimony: Boyd was a candymaker, conducting a candy and fruit stand. His household consisted of himself, his wife, and one small child, and a cousin of his wife, a schoolgirl some sixteen years old, named Nora McDaniel. The family occupied rooms adjoining Boyd's fruit stand. Artman and his wife, Susan, lived in an adjoining building, where the husband conducted a bakery. The rear premises of each house was in a yard common to both. Boyd and Susan Artman soon became friendly, and in constant conversation, Boyd devoting considerable attention to her, to the exclusion to some extent of his wife, though the testimony failed to positively disclose any criminality in this intimacy. Mrs. Boyd was much distressed, and brooded over this intimacy, and intimated on several occasions that she contemplated suicide. Nora McDaniel testified that when she returned from school on Monday preceding the Saturday night on which Mrs. Boyd died she found Mrs. Boyd sick from nausea, vomiting incessantly, and seemingly in in-

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tense pain. A doctor was called in, prescribed several remedies, which were continued during the week and until her death. After this spell on Monday, Mrs. Boyd seemed to rally, and on Thursday was so much better that she was able to be out of bed. On Friday morning she suffered a relapse, and from that time until her death lingered in constant and excruciating pain. During the course of the treatment of the case the attendant physician prescribed several different medicines, which were administered generally by Miss McDaniel, though occasionally by the doctor and by Boyd himself. None of these prescriptions, if correctly compounded, contained poison in any form. For some time prior to the attack on Monday, Mrs. Boyd had been taking another medicine for dyspepsia, from which she was a sufferer. On Friday before Mrs. Boyd's death, the appellant asked the attending physician if he did not think his wife had been poisoned; that he (appellant) suspected that she had taken poison on account of jealousy of Susan Artman. Shortly after the death, while appellant was in the room, sitting on the bed with his dead wife, he was arrested, and carried to another place, where he remained under guard. While under arrest he inquired of the officer who had him in charge for what he was being held. The officer replied for the poisoning of his wife, whereupon the appellant remarked that he suspected that his wife was poisoned even before the doctor had discovered it. It was testified to by a clerk in a drug store that appellant, the week before this death, had purchased a package of poisonous mixture containing arsenic and called "Rough on Rats," and the contention of the state was that this was the poison administered to Mrs. Boyd. It was further in proof that no one had access to the premises occupied by the Boyd family except his own household and the Artmans, with the possible exception of a lady who occupied rooms in another portion of the same building. Appellant did not testify on the trial. During the progress of the trial many objections were made and

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exceptions reserved to the introduction of testimony on behalf of the state.

1. Nora McDaniel and the attending physician, Dr. Dampeer, were each permitted to relate in their testimony the statements made by Mrs. Boyd in reference to what caused her attack on the Monday preceding her death. They stated that Mrs. Boyd told them that, after eating a hearty dinner on Monday, she had taken a dose of her dyspepsia medicine, the last dose in the bottle, and that shortly thereafter she had been taken with nausea and cramps. This was error, plain and palpable. It is well settled that the statements of a party describing the symptoms of the suffering being endured at the time of the statements are admissible, but the testimony now being reviewed does not come within the scope of that rule. Mrs. Boyd was not stating the symptoms which she was then suffering, but was narrating a past transaction, was detailing the circumstances under which she began to experience the suffering, and giving her opinion of the causes which produced her condition. This comes expressly within the condemnation of this court in *Field* v. *State,* 57 Miss., 474 (34 Am. Rep., 476), where the whole subject is lucidly treated.

2. The doctor who had treated Mrs. Boyd produced before the jury several bottles, which, according to his testimony, contained, accurately compounded, the different prescriptions which he had given to Mrs. Boyd, and he was permitted to show the effect that Rough on Rats would have on the liquids in each of the bottles—changing the color of the various medicines in proportion to the amount of Rough on Rats mixed therewith. In connection with this evidence Nora McDaniel was permitted to testify that on the Sunday preceding the death Boyd, in accordance with his usual custom, brought his wife at the breakfast table an orange; that on this occasion the orange had been punctured, and that the juice which oozed out of the hole was of such a peculiar color that Mrs. Boyd refused it, and that witness also declined to eat it, and was allowed to give as her

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reason that she suspected there was something wrong with it; that the orange was not eaten, but in some way mysteriously disappeared. The witness was also allowed to state that the juice which came from the orange corresponded in color with one of the medicines in which the poison had been mixed. This was error of the gravest kind. There was no evidence before the jury that the orange contained any poisonous substance. There was no testimony that any of the medicines taken by Mrs. Boyd during her last sickness had in any wise been changed in color. The effect of this incompetent testimony was to allow, if not to induce, the jury from the bare proof that the admixture of poison would cause a change of color, to leap to the conclusion that poison had been mixed, and yet the witness for the state emphatically and repeatedly denied any knowledge of any change in any of the medicines taken by or administered to the deceased.

3. The only evidence of poison discovered beyond that disclosed by the autopsy was found in a vial, which it was shown had originally contained the dyspepsia medicine, the last dose of which was taken on the Monday preceding the death, and which, according to the improperly admitted statement of Mrs. Boyd, was the cause of her first attack. This vial was kept on a shelf in the kitchen, to which room it was shown no one had access save Boyd, Mrs. Boyd, Nora McDaniel, and the Artmans. During the continuance of Mrs. Boyd's illness, Nora McDaniel, at the request of the doctor, searched for this vial, but, being unable to find it, she was permitted to state that Mrs. Boyd told her where she (Mrs. Boyd) had placed the vial. She was further allowed to testify that the vial had been moved from the place; that she had not moved it; and that she afterwards found it on another shelf, surrounded and hidden by other bottles, still containing a small quantity of a clear liquid different in color from the original compound, and which it was shown contained arsenic. We are unable to comprehend upon what principle the court permitted the witness to repeat to the

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jury the statement made by Mrs. Boyd, not in the presence of the appellant, as to what disposition had been made of the bottle. The damning effect of the testimony becomes manifest upon a moment's reflection. Here was a bottle which originally contained medicine, but in which poison was found, secreted in a room to which only the household of Boyd and the Artmans had access. The witness not only testified that she did not personally remove the bottle, but she was further allowed to repeat the statement of Mrs. Boyd—another of the persons having access to the room—as to where she had placed it. By this improper process of exclusion it was driven home to the jury that, as the bottle had been moved, and as poison had been placed therein, and as two of the persons were shown not to have moved it, no one remained who possibly could have been the active agent except the appellant or Mrs. Artman, who it was argued was his paramour, or her husband, who it is not contended was even suspected of complicity.

4. To accentuate this improper testimony the state was granted an instruction, by which the jury were told that they should convict the defendant if they believed beyond a reasonable doubt that he himself mixed the poison, or "procured it to be done by another," with the intent that it should be taken by his wife, and it was so taken, and caused her death. The effect of this instruction was to say to the jury that, even though the evidence might fail to prove defendant's direct connection with the crime, they should nevertheless convict if they believed that he had procured Susan Artman to mix this poison, yet the record is absolutely devoid of a semblance of proof that Susan Artman was in any manner implicated in administering the poison. This instruction injected into the minds of the jury the unsupported suggestion that appellant had procured in some unexplained manner some other person to administer poison to his wife. It presented to the jury two theories—one wholly unsupported by proof; the other predicated entirely upon evidence purely circumstantial in its character.

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5. It was clearly admissible to show that Boyd disputed one of the witnesses at the preliminary investigation, and denied the statement that he had purchased Rough on Rats from the witness. But a majority of the court think it was error to admit proof that appellant did not testify before the justice of the peace who conducted the preliminary investigation; that he was not put on the stand as a witness, and did not go on voluntarily. It is true that this action of the court was condemned as error in *Bunckley* v. *State,* 77 Miss., 540 (27 South., 638), but the writer hereof is not satisfied of the soundness of that decision, and would not, on this ground alone, consent to a reversal of the judgment herein.

6. The witness who testified that he had sold the Rough on Rats to appellant was permitted on the trial in the circuit court to state that he had testified to the same fact at the preliminary examination. This effort to corroborate the sole witness by whom it was shown that appellant had possession of poison by proving that he had testified to a similar statement upon a different occasion is so plainly erroneous as to scarce require citation of authority. It is never competent to attempt to corroborate a witness by proving affirmatively that on other occasions he had made statements which harmonize with his testimony then related to the jury. The testimony is delivered under the sanctity of an oath, and carries such weight as the jury may attach to it. If intrinsically of doubtful worth or little force, proof that it is mere repetition increases neither its value nor its force. Wharton, Cr. Ev., par. 492; *Williams* v. *State,* 79 Miss., 555 (31 South., 197).

7. The attending physician, over the objection of defendant, testified that on Saturday evening, a few hours before Mrs. Boyd's death, she made to him a dying declaration, which was as follows, as the same appears in the record: "I told her she was very sick, and suffering from some poison, and she remarked, 'Yes, I am going to die.' I told her her husband was under suspicion, and it was her duty to tell us if she had taken

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anything herself, and she promptly replied, 'The Lord is my witness, I have taken nothing except what you gave me.'" That portion of the statement attributed to Mrs. Boyd was properly admitted on this theory: One of the hypotheses deducible from the testimony was that Mrs. Boyd took the poison knowingly, with the deliberate intention of committing suicide. As her language in the dying statement impliedly, if not expressly, contradicted the suggestion of suicide, it was competent, because it tended to eliminate one hypothesis from the case. This part of the statement meets all the tests which render a dying declaration admissible. It was made under a sense of impending dissolution. It was not the mere expression of an opinion, but was the statement of a fact, and could have been given in evidence had the party lived and the defendant been on trial for an attempt to poison. In either event the material inquiry must have been, "Who administered the poison?" If living, Mrs. Boyd would have been a competent witness to deny that she had knowingly taken it. Being dead, her dying declaration was admissible for the same purpose. But the admission should have been restricted to the language used by Mrs. Boyd. In and of themselves by no rational interpretation can her words be distorted into an accusation of her husband. Her meaning, so far as can be gleaned, was simply this: "I am going to die, but the Lord is my witness, I have taken nothing but what you, my physician, gave me." This was not a charge of guilt against appellant. Lying then in the throes of a painful death, the suffering woman, soon to be ushered into eternity, solemnly calls that Deity, in whose presence all must stand, to witness that she has not violated "His canon against self-slaughter." It was error to admit that portion of the dying declaration where the witness, the attending physician, states: "I told her her husband was under suspicion, and it was her duty to tell us if she had taken anything herself." This was incompetent. It was a mere expression of an unsworn opinion of the witness, based upon suspicion only; yet it was introduced before the

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jury, clothed with the sanctity of the solemn circumstances which render a dying declaration admissible. If Mrs. Boyd came to her death by poison, the sole remaining question for the consideration of the jury was, "Who is guilty?" The identity being established, the guilt followed of course. The defense of appellant was, not that the party committing the act was not guilty, but that he was not the guilty actor. It was error to place on the defendant, circumstanced as he was, charged with a most atrocious crime, the burden of having to combat this expressed suspicion of the attendant physician upon the crucial question of his defense, the vital point in the case. The dying declaration should have been limited to the statement made by the dying person, upon whose mind the knowledge of impending dissolution weighs with such gravity as to obviate the legal necessity of an oath. Restricted to the language used by Mrs. Boyd, the jury might reasonably have considered her statement as simply an earnest denial of her own guilt and a rejection of the suggestion made by the doctor. But when her words, uttered under such circumstances, are permitted to go to the jury linked and blended with the suspicion of guilt voiced by the physician who had ministered to her dying needs, they are no longer simply a protestation of her own innocence, but become an accusation from the silent lips of a poisoned wife against a faithless husband. The far-reaching and damaging effect of this admission cannot be overestimated.

After repeated and protracted examination of this record, after the testimony has been carefully scanned many times, we are unable to say that the appellant was granted that fair and impartial trial guaranteed by our law, and we are not able to affirm with confidence that the testimony erroneously admitted may not have contributed to the result. In cases of this character, where the very atrocity of the crime is often of itself sufficient to array public sentiment against the unfortunate accused and place him almost beyond the pale of human sympathy, courts should be only the more scrupulously careful

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Statement of the case.

in guarding in every just manner the rights and privileges to which he is entitled.

Reversed and remanded.

FRANK H. HARTMAN ET AL. *v.* ABSALOM PICKERING ET AL.

1. CHANCERY PRACTICE. *Res adjudicata.*

A complainant in an equity suit cannot escape a plea of *res adjudicata* by bringing the suit in the name of another, not a party to the previous suit, for his use.

2. SAME. *Pro confesso.*

A final decree of the chancery court predicated of a *pro confesso* just as effectually ajudicates the rights of the parties as any other final decree.

3. SAME. *Concrete case.*

A suit in equity enjoining an action of ejectment and seeking a reformation of deeds and a sale of the lands to satisfy certain liens, under a defective foreclosure of which the complainant acquired an interest in the land, to which a tenant of the complainant, an assignee of the lease, claiming a conditional right to become a purchaser at the end of the lease, is made a defendant and who is charged to have colluded with the plaintiff in ejectment in order to defraud the complainant, and which culminates in a decree in complainant's favor directing the sale of the lands, subject to certain adjudicated rights of the tenant, will preclude the tenant from asserting any greater rights than those awarded him by the decree.

FROM the chancery court of Lincoln county.

HON. ROBERT B. MAYES, Chancellor.

Pickering and another, appellees, were complainants in the court below; Hartman and wife, appellants, were defendants there. From a decree in complainants' favor the defendants appealed to the supreme court. The opinion states the facts of the case.

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Brief for appellees.

Frank Johnston, and *Jones & McCullough,* for appellants.

By the decree of the Franklin county chancery court it was adjudged, expressly, that Pickering had no interest in the land except as a tenant for the year 1902. It was further expressly adjudged that he was to pay $50 for the rent for that year. Pickering performed this decree by paying the $50.

It appears clearly that Pickering's rights under said contract were expressly decided in the former decree. Whether that decree is correct or erroneous is wholly immaterial, as it stands now unreversed and not even appealed from.

It is not at all necessary to invoke the doctrine that everything that might have been litigated in the former suit is *res adjudicata* in view of the fact that Pickering's rights were expressly adjudicated in the former judgment.

Under the averments of the bill, that Pickering had not complied with his contract and that he no longer had any rights under the same, and upon the *pro confesso* decree against Pickering, which was an admission of the truth of these averments, the chancellor could not have done otherwise than adjudge that he should pay rent for 1902, and vacate the property at the end of that year.

This in effect vacated the contract between Hartman and Pickering, and left the latter as a tenant for one year. It was equitable and just to leave him the year within which to gather his then growing crop.

A. C. McNair, for appellees.

The rule as to *res adjudicata* as announced by this court, speaking through Mr. Justice Campbell, is: "The mere fact that a claim might be introduced and propounded in a suit does not constitute *res adjudicata,* if, in fact, it was not involved." *Hubbard* v. *Flynt,* 58 Miss., 266; *Davis* v. *Davis,* 65 Miss., 498; *Lorance* v. *Platt,* 67 Miss., 183.

The matters now before the court were not in fact litigated in the former suit.

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Opinion of the court.

Argued orally by *Frank Johnston,* for the appellants.

CALHOON, J., delivered the opinion of the court.

Pickering's bill, in which he is joined by Bardwell for Pickering's use, is to reform a contract of date July 12, 1899, so as to correct an erroneous description of land, and for specific performance of it as corrected, and to enjoin Hartman from prosecuting an action he had brought against a mercantile firm for the value of cotton it had bought from Pickering. That contract is as follows:

"State of Mississippi, Lincoln County. This agreement, made this the 12th day of July, by and between F. H. Hartman and Isaiah Bardwell, which is in substance as follows: F. H. Hartman has this day leased to Isaiah Bardwell the following tract and parcel of land situated in Franklin county, Mississippi—to wit., W. 1-2 of S. E. 1-4 of section 12 and ten acres on north side of N. W. 1-4 of N. E. 1-4 of section 11, township 6, range 5, containing ninety acres more or less, upon the following terms—to wit: On October, 1899, Bardwell is to pay Hartman one bale of good middling cotton, to weigh four hundred and fifty pounds; and on October 1st, 1900, $110; on October 1st, 1901, $120; on October 1st, 1902, $130; on October 1st, 1903, 140.

"Now, when each and every one of said payments are fully satisfied, then the said F. H. Hartman covenants and agrees to make said Isaiah Bardwell a good and valid deed of conveyance to the aforesaid land.

"It is further understood and agreed should a misfortune or disaster occur to the crop, the said Isaiah Bardwell will pay as much as forty ($40) dollars; the remainder of said note is to be carried over to the next year.

"F. H. HARTMAN,
"ISAIAH B. X. BARDWELL.

"Witness, J. A. Eitel."

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Under this contract Hartman had all the rights of a landlord until final payment made, when, and not until when, he could be compelled to convey title to Bardwell or his assigns. Concededly, there was an accidental misdescription of the land, and clearly the reformation of the contract, together with a decree for specific performance, was an equitable right, unless defeated by intervening defenses. The history of the land designed to be described is that it was once owned by one Buckles, from whom Hartman derived it under a conveyance from a trustee with the same misdescription as appears in the contract above recited between Hartman and Bardwell, all being ignorant of any error in the description; but Hartman had been in possession and put Bardwell in possession of the right land as it should have been described, and Bardwell sold his interest in his contract with Hartman to Pickering, and put him in possession. In this situation there would have been no legal trouble if the land had been properly described, and if Pickering had made or tendered the payments which he says he did, but which Hartman denies. But during Pickering's possession the error in the description was discovered, and it came to the ears of Buckles, the common source, and Buckles brought ejectment; whereupon Hartman filed a bill against Buckles and Pickering, praying that Buckles be perpetually enjoined from prosecuting his ejectment suit, that the conveyance from Buckles to Hartman be reformed, that an account of the debt be ordered, and for sale of the land to satisfy the debt, and for "such other relief, general and special, as the nature of the case may entitle him to receive." As predicate for this prayer Hartman set up in this bill the facts stated in this opinion, and that Pickering was in as sublessee of Bardwell; that Pickering, while so in possession, discovered the mistake in the description, and refused to pay the rents under the contract, and that Pickering himself told Buckles of the mistake in the description, and that the ejectment suit was by collusion between them to enable Pickering to defraud Hartman of his title; that Pickering with-

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holds possession and refuses to pay rent; and the bill claims the right to have Pickering removed from the possession. Pickering was duly made a party by personal service of proper process in that suit, and made no answer, and a *pro confesso* was taken against him. The final decree in that cause was made April 30, 1902, "on bill, exhibits, answer, cross-bill and answer thereto, and *pro confesso* against Pickering, and proofs oral and documentary taken in open court by agreement." It adjudges that Hartman "is rightfully entitled, as mortgagee, to the possession" of the land; that Buckles be perpetually enjoined from prosecuting the ejectment suit; that the conveyance be reformed, the debt be ascertained, and the land sold in default of its payment; and concludes in these words: "It is also adjudged and decreed that, as against the defendant, A. Pickering, the complainant is entitled to the possession of said lands, and to the rent therefor for the year 1902 at the price and sum of $50, which said sum is payable on or before November 1, 1902, and shall be a lien on the crops that Pickering may raise thereon during the year; and that, as against the purchaser or purchasers of the land at a sale under this decree, said Pickering may retain possession until December 31, 1902, and no longer, and that the sale shall be made subject to Pickering's right to the possession and use of the said land for the year 1902." Pickering was personally present when that final decree was rendered, and made no objection to it, except that he requested Judge Cassedy, a counselor at law, to ask the chancellor not to tax him with the costs, to which the chancellor agreed, and no costs were taxed to him. He paid the $50 rent for 1902, pursuant to the decree, and pursuant to that decree the land was sold, and Mrs. Hartman bought, and she is, by an amended bill, made a party defendant to the present suit now before us. The former decree, with the confirmed land sale pursuant to it, stands unappealed from the unreversed, and is pleaded in the present suit as *res adjudicata*. This plea, we think, is fully sustained by the record adduced in support of it. It adjudi-

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cated adversely to Pickering the very claim he sets up in his bill in the present suit. It he did not set it up in defense in the other suit, he might have done so, and is equally bound by the decree in that, and cannot relitigate it by joining Bardwell as co-complainant for his use.

Reversed, and decree here dismissing the bill.

ROBERT E. HALSELL *v.* WILLIAM D. TURNER.

1. ATTORNEY AND CLIENT. *Attorney's lien. Extent.*

An attorney has a lien on the funds of his client for services rendered in the proceedings by which the money was collected, but not for services rendered in other cases.

2. SAME. *Exemptions. Wages. Code* 1892, § 1963, *par.* 10*a*.

Money collected by an attorney on a claim due his client for wages, exempt from execution or garnishment under Code 1892, § 1963, par. tenth (a), is not exempt from the attorney's lien.

FROM the circuit court of Jones county.

HON. JOHN R. ENOCHS, Judge.

Turner, appellee, was plaintiff, and Halsell, appellant, was defendant in the court below. From a judgment in plaintiff's favor the defendant appealed to the supreme court.

Turner employed Halsell to collect a debt due him from the city of Laurel for wages, of which $100 was exempt from execution or garnishment under Code 1892, § 1963, par. 10*a*. Halsell brought suit, and collected $116.80, and kept it, claiming that Turner owed him all of it except about $11 as attorney's fees for services rendered as such on several different occasions. Turner brought this suit against Halsell to recover the entire sum collected. The court below gave a peremptory instruction to find for the plaintiff for the entire amount.

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Brief for appellee.

Harper & Potter, for appellant.

It is well settled in Mississippi that a lawyer has a lien on the funds of his client in his possession, collected under a judgment, for his fee in that particular case, but not on a general account. *Stewart* v. *Flowers,* 44 Miss., 515; *Pope* v. *Armstrong,* 3 Smed. & M., 214; *Cage* v. *Miles,* 3 Smed. & M., 223; *Harney* v. *DeMoss,* 3 Howard, 175.

The court clearly erred in giving the peremptory instruction in favor of Turner for the full amount. It should have allowed Halsell to offset his fee for services rendered in obtaining and collecting the money in his hands, since he had a lien on it for his fee. It is manifest that Turner's right to an exemption could not prevail against the lien of Halsell on this specific fund.

R. E. Halsell, pro see, on same side.

Olin C. Hunt, for appellee.

An attorney may have a lien on a client's papers for a general balance of account; but he has no such lien on his client's money. His lien on money is limited to a liquidated fee in the case in which the money is collected, and unless the fee is liquidated, he has no lien. And his right of set-off is good only to the extent of his lien for fees in that particular case. *Dunn* v. *Vannerson,* 7 How. (Miss.), 579; *Pope* v. *Armstrong,* 3 Smed. & M., 214; *Case, Assignee,* v. *Wilkinson & Miles, Id.,* 223; *Pugh, Administrator,* v. *Boyd,* 38 Miss., 326; *Stewart* v. *Flowers,* 44 Miss., 531, and cases there cited; *Harney* v. *DeMoss,* 3 How. (Miss.), 175.

But appellee forfeited his right to a fee in the case of *City of Laurel* v. *Turner* because of his refusal to pay over the $116.80 collected in that suit. "When an attorney collects money for his client, and, without legal reason, retains the same and refuses to pay it over, whereby the client is forced to resort to legal proceedings against him, involving the employment of another attorney, the collecting attorney loses his right to com-

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pensation for the collection of the funds." 3 Am. & Eng. Ency. Law (2d ed.), 444, and notes. It is as much a part of the attorney's contract to pay over as to collect funds, and if he breaches his contract, he cannot recover anything. *Wooten* v. *Read,* 2 Smed. & M., 585; *Timberlake* v. *Thayer,* 71 Miss., 279; *Gray* v. *Conyers,* 70 Ga., 349; *Breden* v. *Kingland,* 4 Watts (Pa).

There is still another reason why no set-off can be allowed against the $116.80 collected: Turner is a laborer and the head of a family, and claims his exemption as such. To allow the set-off would defeat our exemption laws by taking from him that which the law undertakes to guarantee him. *Cleveland* v. *McCanna,* 66 Am. St. Rep., 670; *Pruitt* v. *Beard,* 44 Am. Rep., 280; 22 Am. & Eng. Ency. Law (1st ed.), and cases cited in note 3.

TRULY, J., delivered the opinion of the court.

The rule in this state has always been that an attorney has a lien on the funds of his client for the services rendered in the proceeding by which the money was collected. *Dunn* v. *Vannerson,* 7 How., 579; *Pope* v. *Armstrong,* 3 Smed. & M., 221; *Cage* v. *Wilkinson, Id.,* 223; *Stewart* v. *Flowers,* 44 Miss., 518 (7 Am. Rep., 707). This lien applies so long as the attorney has the funds in his possession, and is paramount to any other claim. The rule is the same whether there exists an express contract between attorney and client for a stated fee or whether there is only an implied contract to pay the reasonable value of services rendered. Appellant's contention that he was entitled to apply the entire proceeds of the judgment which he had obtained for his client to the credit of the general account of the client for fees claimed for services rendered in other matters is unsound. His claim is limited to the contract price agreed upon, or the reasonable value of services rendered, in the special case.

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The contention of appellee that this lien does not apply in the instant case because the fund in the hands of the attorney represents appellee's wages, which he claims as exempt, is likewise unsound. The lien which appellant has applies to the money in his hands, and cannot be defeated on the ground that appellee's interest therein might be exempt from seizure under legal proceedings instituted by third persons. The attorney has a prime lien granted by law and growing out of the relation of the parties.

The instruction of the court below proceeded upon an erroneous theory. Wherefore the judgment is reversed and the cause remanded.

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CITY OF LAUREL ET AL. *v.* HENRY H. ROWELL ET AL.

1. MUNICIPALITIES. *Code* 1892, § 2945. *Closing streets. Compensation. Abutting property owners.*

Code 1892, § 2945, empowering municipalities to close and vacate streets, does not dispense with the necessity of compensating abutting property owners.

2. SAME. *Constitutional law. Private property. Public use. Constitution* 1890, *sec.* 17.

Where a municipality closes and vacates an established street it deprives the owners of abutting lots of a right, which is property, and which cannot be taken except on due compensation being first made, under Constitution 1890, sec. 17, regulating the taking of private property for public use.

FROM the chancery court of Jones county.

HON. STONE DEAVOURS, Chancellor.

Rowell and another, appellees, were complainants, and the city of Laurel and the Laurel Improvement Company, a corporation, appellants, were defendants in the court below. From a decree in complainants' favor the defendants appealed to the supreme court.

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Brief for appellants.

Post street in the city of Laurel, Mississippi, is a narrow street running east and west, about 200 feet long, connecting East and Pine streets. The Laurel Improvement Company owns all the land abutting on the street on the north side, and appellees own all the land abutting it on the south side, and have erected a hotel and other houses thereon. On the 7th day of September, 1903, the board of mayor and aldermen passed an ordinance vacating and closing Post street, and the Laurel Improvement Company, claiming to own the land vacated, built a fence across each end of it, and erected some buildings in it; whereupon appellees filed their bill in this case against the city of Laurel and the Laurel Improvement Company, setting up these facts, and averring that when they bought their property and improved it said street was open to travel; that the city of Laurel had worked it for more than ten years; that it was laid down on the map of the city of Laurel as a street; that it had been used and recognized by the city of Laurel and the public as one of the streets of said city for more than ten years. The prayer of the bill was that the city of Laurel and the Laurel Improvement Company be enjoined from further meddling with the rights of complainants, and commanded to reopen and reëstablish the said street, and that the Laurel Improvement Company be required to remove all obstructions placed by it in said street. The defendants filed separate answers, denying generally the right of complainants to the relief sought, and denying that they were deprived of access to their property by the closing of said street. The city of Laurel counted upon Code 1892, § 2945, as authorizing the passage of the ordinance. Affidavits were taken on a motion to dissolve the injunction. The motion to dissolve the injunction was overruled, and defendants were granted an appeal to the supreme court to settle the principles involved in the case.

Mayes & Longstreet, and *J. M. Jayne, Jr.,* for appellants.

It is expressly admitted in the brief of opposite counsel that the city of Laurel is working under the code, and sec. 2945 ex-

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Brief for appellants.

pressly provides that municipalities shall have the power to close and vacate any street or alley or any portion thereof.

The further objection is made that this ordinance is void and forms the ground for an injunction, because it was made without condemnation proceedings and without compensation to the complainants.

In this connection the court will note that the complainants are not deprived of access to their property. The vacation of Post street still leaves them their front on East Front street and their front on Pine street and a ten-foot alleyway on the old Post street front. As to the point involved, see 15 Am. & Eng. Ency. Law, 402, and cases cited therein; *Gerhard* v. *Sekonk Commrs.*, 15 R. I., 334; *Clark* v. *Providence*, 16 R. I., 337; *Levee District* v. *Farmer*, 101 Cal., 178; *Bradbury* v. *Walton*, 94 Ky., 167.

It seems to be clear that the vacation of a street under the ordinary frame of constitution, which provides that private property shall not be taken for a public use without compensation first made, does not entitle the abutting proprietors to compensation, since by the vacation no property of the abutting proprietor is taken, such proprietor not having any such special property in the street as a street as falls within the protection of the constitutional principle.

That this is a correct legal proposition is furthermore recognized in our own case of *Vicksburg* v. *Herman*, 72 Miss., 211.

Is this rule altered by the fact that our constitution of 1890 is made broader, and provides that private property shall not be damaged for a public use without compensation first made? As decided in the Vicksburg case above, the word "damaged" was introduced into this provision in order to cover consequential damages inflicted upon abutting property where no part of that property was itself taken in the ordinary sense of this word. That provision was construed and applied in the Vicksburg case, 72 Miss., 211. But the effect of the term as implied

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Brief for appellees.

in our constitution and as construed and applied in that case, is not to alter the rule declared above; it does not invest the abutting proprietor with a property right in the street as a street. The effect is quite different; it is to render the condemning corporation, whether a business or municipal corporation, liable for consequential damages to property which is not taken. The constitution by its very terms makes a difference between the taking of property and the damaging of property. But even our broad and liberal constitutional provision does not reach this case. It does not reach it for the reason that the vacation of a street is not the taking or damaging of property lying adjacent thereto, for a public use.

Whatever may be the effect and meaning of the constitutional provision otherwise, it only applies in those instances where what is done is done for the use of the public. The condemnation of land whereon to establish a street is a taking of it for the public use, because the object of its taking is that the public shall use it as a street. So in the Vicksburg case, the altering of the grade of the street, as was there done, was a taking for a public use, because the street as altered continued to be used by the public and the alteration of the street was for the public's more convenient continued use.

But the vacation of a street is the cessation of public use. The very fact imports an abandonment of its use by the public. The cessation merely of the public use of property is not such a thing as gives the right of the constitutional protection.

This injunction should have been dissolved because it was mandatory and was improvidently issued. It should not issue until the case has been fully presented. *Gulf Coast Co.* v. *Bowers,* 80 Miss., 570.

J. P. Thornton, and *T. H. Oden,* for appellees.

In order to fully appreciate the controlling powers of a city over its streets, alleys, and highways, we must observe who are

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interested in them, and what interest the city and others have in them. This subject has already been fully and ably discussed by this court, in *Meridian* v. *Telegraph Co.*, 72 Miss., 910, and *Theobold* v. *L., N. O. & T. Ry. Co.*, 66 Miss., 279; and in the latter case, at page 287, the court says: "The laying out of a public street creates two coextensive rights, one belonging to the public to use and improve the street, for the ordinary purposes of a street, ... the other to the abutting owner to have access to and from his property over the street, and to make such use of the street as is customary and reasonable. Both are valuable, and the one is as inviolable as the other." Whether the abutting owner has simply an easement in the street, while the fee is in the public or in some other owner, or whether he has both the fee and an easement, he is equally entitled to require that nothing shall be done in derogation of his rights. 1 Hare on Const. Law, 370, 375; Lewis on Eminent Domain, secs. 114, 115; *Barney* v. *Keokuk*, 94 U. S., 324; *R. R. Co.* v. *Schurmer*, 7 Wall., 272; *Stry* v. *N. Y. El. R. R. Co.*, 91 N. Y., 123; 1 Rorer on Railroads, 524; *Haynes* v. *Thomas*, 7 Ind., 38; *Anderson* v. *Turbeville*, 6 Coldw., 150; *S. C. R. R. Co.* v. *Steiner*, 44 Ga., 546; *Crawford* v. *The Village of Delaware*, 7 Ohio, 460.

And in *Lahr* v. *Met. El. R. R. Co.*, 104 N. Y., 268, the court says: "If the rights of the abutting owner may be taken from him without his consent or without compensation, a system has been inaugurated which resembles more nearly legalized robbery than any other form of acquiring property."

So we are forced to conclude that if the city of Laurel wishes to close one of its streets, or appropriate it to any other purpose than its ordinary use as a street, it must first do one of two things—obtain the consent of the abutting owners, or exercise the right of eminent domain, and pay the damages. The following authorities very thoroughly discuss this question, and in substance hold that this is the law: *Vicksburg* v. *Herman*, 72

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Opinion of the court.

Miss., 211; *R. R. Co.* v. *Bloom,* 71 Miss:, 247; *Stowers* v. *Postal Tel. Co.,* 68 Miss., 559; Constitution of 1890, sec. 17, art. 3, and annotations there given; *Bannon* v. *Rohmeiser,* 90 Ky., 48 (29 Am. St. Rep., 355, and cases there cited); *Lindsey* v. *The City of Omaha,* 30 Neb., 512 (27 Am. St. Rep., 415, and cases there cited); *City of Buffalo* v. *Pratt,* 131 N. Y., 293 (64 Am. St. Rep., 592, and cases there cited); *State* v. *Murphy,* 134 Mo., 548 (56 Am. St. Rep., 515); *City Council of Montgomery* v. *Parker,* 114 Ala., 118 (62 Am. St. Rep., 95); *Haynes* v. *Thomas,* 7 Ind., 38; *Crawford* v. *The Village of Delaware,* 7 Ohio, 460; *B. & M. R. R. Co.* v. *Reinhackle,* 15 Neb., 279.

Argued orally by *T. H. Oden,* for the appellees.

CALHOON, J., delivered the opinion of the court.

When people build on the side of, and with reference to, a public street, they acquire an easement in its free user by them and the public and in the resultant value of such user. This is property, and cannot be taken from them or damaged by closing the street, except upon compensation first paid. The closing of the street is a taking of the easement for the public use in the purview of our constitution. If this be not true, three out of five of a municipal board, as in this case, may work ruin at will on property holders. Moreover, we think this record shows that the closing of Post street was in order to put appellant corporation in possession of it, and this is *ultra vires* and intolerable. *Smith* v. *McDowell,* 148 Ill., 51 (35 N. E., 141; 22 L. R. A., 393; 1 Am. & Eng. Ency. Law, 225–226); *Moose* v. *Carson,* 7 L. R. A., 548, and notes; Elliott, Roads and Streets, sec. 877; 2 Smith, Mun. Corp., sec. 1215. Three out of five of a municipal board cannot, nor can the whole board, do what, very clearly, the Legislature itself, the only fountain of its authority, is powerless to do. The tendency of these boards throughout the country is to usurp pow-

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ers not given them. Countless oppressions of private citizens, too poor, too ignorant, or too humble to excite attention or enlist the advocacy of the influential, never see the sunlight of the courts of law. Many schemes which are hatched in "the perfumed chambers of the great" are feathered and winged in these councils, to the injury of the lowly and the poor. They must be held in with a tight rein at the bar of the people sitting in the persons of their judges in their solemn tribunals of justice. All the citizens of a town have the right to have their public thoroughfares, streets, or alleys, whether acquired by dedication or user, kept open for their own use and the use of visiting strangers who come for commerce or social intercourse. They should never be closed except when plainly for the public good, and cannot then be closed except upon compensation first paid for any damage to abutting proprietors. It is of no avail, in the case before us, to talk of the consent of one of the two co-owners that the closure might be made if a ten-foot alley were left. The ordinance leaves no alley, but is that Post street be closed, and, on this record, the ordinance would be void if it had left the alley.

The chancellor was right in refusing to dissolve the injunction. This being on appeal to settle the principles of the case, we affirm at appellants' costs in this court, and remand for further proceedings.

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Brief for appellants.

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IDA MAY WILDBERGER ET AL. v. WILLIAM F. SHAW, ASSESSOR, ETC., ET AL.

TAXATION. *State lands. Purchase from state. Date of liability for accruing taxes. Code* 1892, §§ 3794*a*, 3801.

Lands purchased from the state after February 1st, but before October 1st, are not liable to taxation for the year in which the purchase is made, any more than lands so purchased after October 1st, under Code 1892, § 3794*a*, requiring copies of assessment rolls to be delivered to the auditor and tax collector on or before October 1st, and Code 1892, § 3801, directing the collector to collect taxes on receipt of the rolls.

FROM the chancery court of, second district, Coahoma county.
HON. A. McC. KIMBROUGH, Chancellor.

Mrs. Wildberger and others, appellants, were complainants, and Shaw, assessor, and Shannon, tax collector, appellees, were defendants in the court below. From a decree partly in defendants' favor the complainants appealed to the supreme court. The facts are sufficiently stated in the opinion of the court.

R. H. Wildberger, for appellants.

The appellants having purchased land from the state of Mississippi between the 5th day of February, 1900, and the 23d day of December, 1900, claim that the lands so purchased are not assessable for taxes for the year 1900, and in support of their claim cite the following statutes, Code 1892:

"Section 3744. The following property . . . shall be exempt from taxation: (c) All property, real or personal, belonging to this state . . . ."

"Section 3746. All taxes assessed shall be a lien upon, and binding the property assessed, from the 1st day of February of the year in which the assessment shall be made . . . ."

If this section be enforced, then the state of Mississippi conveyed these lands with a lien upon them, and the state of Mis-

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sissippi must discharge this lien, else purchasers get only a quit-claim, when the state purports to give them an absolute title.

"Section 3748. What date fixes liability to taxation: All taxable property in the state of Mississippi, or acquired or held by any person before the 1st day of February, shall be assessed, and taxes thereon paid for the current year."

"Section 3771. Lands—When assessed: Lands shall be assessed between the 1st day of February and the 1st day of June in the year 1892, and every four years thereafter."

Section 3778 provides for the assessment of lands sold to the state at a valuation furnished by the commissioner, if the time for redemption have expired, but the state shall not pay the county, or other tax on such land, and if redeemed all subsequent accrued taxes, including taxes of the year of redemption, shall be paid when redeemed, if the county taxes have been levied at the date of redemption.

None of the lands embraced in this suit are redemptions.

Section 3780 provides that all sixteenth sections or school lands shall be liable, after leased, "to be taxed as other lands are taxed," which evidently would not require these lands to be taxed, except to the owners of them, on February 1st of each year.

Section 3779 requires the land commissioner to transmit on the first Monday of January to the assessor "a list of the lands for which he has issued patents during the preceding twelve months."

If this section means anything, it is to give the assessor information so that he may assess for the succeeding year the lands which have been patented by the state during the preceding year.

Section 2573 provides that when a patent shall issue for public lands notice shall be given to the chancery clerk, who shall file the notice, entering the land upon the assessment roll; "and the tax collector shall collect the taxes thereon as in other cases of additional assessments;" but this section evidently cannot

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Opinion of the court.

mean that the taxes shall be collected for the succeeding years until a new land roll is made (once in every four years), for there is no direct provision of law that lands shall be assessed to an individual, unless they belonged to the individual on the first day of February of the year for which the assessment is made. The only power to add to the roll for the current year is that given to the assessor in sec. 3800, which empowers the assessor to add any person or thing to it before action on the roll by the board, and after the roll has been approved by the board, power is given to the tax collector under sec. 3804 to assess lands liable to taxation unassessed by the assessor, or land that has become liable to taxation since the last assessment.

CALHOON, J., delivered the opinion of the court.

On divers days between February 5th and December 18th of the year 1900 appellants bought lands from the state. In all they bought twenty-two parcels, seven of them before October 1st and fifteen of them after October 1st of that year. They enjoined assessment and collection of taxes for that year on all of them. The chancellor properly made the injunction perpetual as to the fifteen parcels bought after October 1st, but we think he erred in dissolving it as to the seven parcels bought before that date. We do not see that any significance can be attached to the 1st day of October. It figures only in secs. 3794*a* and 3801 of the code. Section 3794*a* simply requires delivery of copies of assessment rolls to the auditor and tax collector on or before that day, and sec. 3801 merely directs the collector to proceed to collect taxes on receipt of the roll. Lands bought from the state on February 2d of any year are no more taxable for that year than are lands bought on January 31st of the next year. February 1st is the day which fixes liability to taxation.

Reversed, and decree here retaining the injunction and making it perpetual as to all lands described in the bill.

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Statement of the case.

GEORGE M. FOOTE *v.* HALL COMMISSION COMPANY.

ATTACHMENT. *Writ. Defects. Service. Dismissal. Amendment.*

Defects in proceedings by which an attachment writ was sued out and served will not justify the dismissal of the suit on the debt, nor deprive the plaintiff of the right to amend and sue out alias process.

FROM the circuit court of Jones county.

HON. JOHN R. ENOCHS, Judge.

Foote, the appellant, was plaintiff, and the Hall Commission Company, appellee, was defendant in the court below. From a judgment dismissing the suit on defendant's motion the plaintiff appealed to the supreme court.

Foote sued out a writ of attachment against the Hall Commission Company in the circuit court of Perry county. The affidavit was made before T. G. McCallum, the bond was approved by him, and the writ was issued by him. It nowhere appears in the record that T. G. McCallum occupied any official position, he simply signing his name to these instruments. He appointed one E. Holifield as a special deputy to execute the writ of attachment. It was suggested by plaintiff that the First National Bank of Laurel and the Bank of Laurel were indebted to defendant. Holifield made the following return on the attachment writ: "I have this day executed the within writ upon the First National Bank of Laurel by handing C. H. Ferral, assistant cashier of said bank, a true copy." He made a like return as to the Bank of Laurel. The Bank of Laurel and the First National Bank of Laurel were summoned as garnishees, and the First National Bank of Laurel answered that it was indebted to defendant. The writ recites that the Hall Commission Company was not found in the city. All these papers were handed to the sheriff of Perry county, who made no return on them at all, but simply put them in a pigeon-

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Brief for appellant.

hole in his office. Plaintiff filed his declaration in the circuit court. The defendant appeared by attorney, and moved to dismiss the attachment, first, because the writ was served by a person specially deputized to execute same, and returned to the circuit court by said specially deputized person, and not by the sheriff of the county, as required by law; second, because the court had no jurisdiction of the suit; third, because the writ of attachment had not been executed by an officer authorized by law to execute it; and because, fourth, it does not appear that the writ of attachment was issued by any officer authorized to issue a writ of attachment returnable to the circuit court. Plaintiff moved to be allowed to amend the affidavit and for an alias attachment writ. His motion was overruled. The motion to quash the attachment writ and dismiss the cause, made by the defendant, was sustained, and the cause was dismissed.

J. M. Jayne, Jr., for appellant.

When a party appeared and moved to quash an attachment, this is an appearance for all purposes, and the court should have proceeded to judgment *in personam. Lawrence* v. *Featherstone,* 10 Smed. & M., 345. Even though plaintiff had not objected, and all the grounds of the above motion were well taken, still, the defendant being in court, the court should not have dismissed the suit of appellant.

The first and second grounds of the motions are one and the same, and both proceed along the same line—that the writ was served by a person other than the sheriff and returned to the circuit court by such person. This is not the fact in the case at bar. In the case at bar the writ was served by a specially appointed officer, who served the writ on the garnishees and returned the same not found as to the defendant. After making this return thereon, he turned the writ over to the sheriff of Jones county, who, without making any notation thereon, returned it into the circuit court. The law was complied with.

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Opinion of the court.

There was no property seized, and of course none was turned over to the sheriff. *Barnett* v. *Ring,* 55 Miss., 97; *Bates* v. *Crow,* 57 Miss., 676.

Besides this, the court should have allowed the sheriff to make his return, as per the request of the plaintiff.

Alexander & Alexander, and *Geo. B. Power,* for appellee.

It is not shown that T. G. McCallum occupied any official position at all. Assuming that T. G. McCallum was mayor of Laurel, there is nothing in the record to show that he was clothed with any judicial powers for the purpose of issuing a writ of attachment. No emergency existed which called for the appointment of some person (not an officer) for executing the writ. The writ was never properly returned, so as to give the court jurisdiction.

The motion of plaintiff to amend the affidavit and writ was properly overruled, as the court had no jurisdiction of the matter, even for the purpose of allowing such an amendment. The court properly sustained the motion of defendant to quash the affidavit and writ.

WHITFIELD, C. J., delivered the opinion of the court.

The attachment law now in force is substantially the same as that under Act 1878, p. 193, ch. 72, and *Bates* v. *Crow,* 57 Miss., 678, furnishes the true doctrine for the solution of this case. The court said there: "In any point of view, therefore, it was erroneous to dismiss the entire case. The utmost that the court could have done was to dismiss the attachment proceeding; and even this would have been improper if the plaintiff had asked for the issuance of an alias writ of attachment to be properly issued and returned, as was held in *Barnett* v. *Ring,* 55 Miss., 97. This may yet be done on the return of the case to the court below." Now, in the case before us the appellant asked for this very thing—the issuance of an alias writ of attachment; but his request was denied. This was error. The

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Statement of the case.

court should have issued the alias writ of attachment; and, since the attachment branch of the suit is thus kept properly alive, it was, of course, error to dismiss, as the court below did, the entire suit. It may be objected that no personal service was had upon the defendant, but, since the attachment branch of the proceeding remains to be perfected, the court below should direct the issuance of an alias summons, as well as an alias attachment, so that the defendant may be personally served. There is no merit in any of the other positions taken by the appellee.

Reversed and remanded.

HENRY HARTZOG v. WESTERN UNION TELEGRAPH COMPANY.

TELEGRAPH COMPANY. *Telegrams. Contract. Claim for damages. Time for filing.*

A provision in a contract for the transmission and delivery of a telegram that the telegraph company will not be liable for damages in any case, unless a written claim for damages is presented to it within sixty days after reception of the message for transmission, is reasonable and valid.

FROM the circuit court of, second district, Perry county.

HON. JOHN R. ENOCHS, Judge.

Hartzog, the appellant, was plaintiff, and the telegraph company, appellee, defendant in the court below. From a judgment in defendant's favor the plaintiff appealed to the supreme court. The suit was to recover punitive damages for the failure to deliver a telegram sent to plaintiff at Hattiesburg from Mt. Olive, Mississippi. To the declaration defendant pleaded the general issue, and gave notice of special matter of defense. One ground of defense was that the message was delivered to the defendant company on the 3d of June, 1902, and that it stipulated that the company would not be liable in damages

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Brief for appellee.

where the claim was not presented in writing in sixty days after the message was filed with the company for transmission, and that no claim had been filed within the sixty days. It was conceded that the telegram was never delivered. It was shown by the evidence that no claim was filed for damages until suit was brought, which was much longer than sixty days from the time the telegram was delivered to the defendant company for transmission.

K. McInnis, Geo. B. Power, and *Alexander & Alexander,* for appellant.

This is the usual case. A sister is dying. The mails cannot reach an absent brother in time for him to come. A public carrier holds itself out as ready to meet such a case. Its name is telegraph company, which means quick message. A citizen trusts the company, pays it what it charges, sends the telegram: "Lyde is dying. Tell Benson to come." The telegram is sent, but never delivered, although the operator at place of destination knows the sendee, lives within two hundred yards of him, and sees him every day.

Harris & Powell, for appellee.

The message was delivered to the company for transmission on the 3d of June, 1902. It contained the usual stipulations in the following words: "The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission." The plaintiff in this suit had notice of the sending of this message on June 6th, 1902. This suit was filed on October 21st, 1902. The court should have given the peremptory instruction asked for by the defendant. *Clement* v. *Telegraph Company,* 77 Miss., 747.

Argued orally by *J. B. Harris,* for appellee.

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Statement of the case.

CALHOON, J., delivered the opinion of the court.

A stipulation in the contract for the transmission of a telegram, that the company would not be liable for damages "in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission," is valid and binding. This is precisely so decided in *Clement* v. *Telegraph Co.*, 77 Miss., 747 (27 South., 603), which is in keeping with the decisions of this court in kindred matters of contract limitations as to express companies; in *Southern Express Co.* v. *Hunnicutt*, 54 Miss., 566 (28 Am. Rep., 385); and, as to life insurance companies, in *Universal Life Ins. Co.* v. *Whitehead*, 58 Miss., 226 (38 Am. Rep., 322); and in *J. D. and Lula G. Bonner* v. *Mutual Life Ins. Co.* (this day delivered), 36 South., 538. Our conclusion makes it unnecessary to give our views of the instructions or as to whether the facts in the record before us warrant punitive damages.

Affirmed.

MORRIS JACOBS ET AL. *v.* ANDREW R. JOHNSON.

APPEAL. *Justice's court. Circuit court. Dismissal. Amount of judgment.*

A plaintiff causing defendant's defective appeal to the circuit court to be dismissed is only entitled, upon defendant's failure to perfect the appeal, to a judgment in the sum for which the justices' court gave judgment, with interest and statutory damages, although the plaintiff's demand was for a larger sum.

FROM the circuit court of Harrison county.

HON. WILLIAM T. MCDONALD, Judge.

Johnson, appellee, was plaintiff, and Jacobs and another, appellants, were defendants there. From a judgment in plaintiff's favor defendants appealed to the supreme court.

The facts are sufficiently stated in the opinion of the court.

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Opinion of the court.

Harper & Harper, for appellants.

W. H. Maybin, for appellee.

TRULY, J., delivered the opinion of the court.

Appellee instituted suit against appellants before a justice of the peace on an account for $168.80. Judgment was rendered against the defendants for $90, and they appealed to the circuit court, but the record discloses that the appeal bond was never approved. When the case came on for hearing in the circuit court, the appeal was dismissed, and judgment rendered against the defendants and the sureties on their bond for the total amount of the demand for which they were sued. This was erroneous. Where a defendant appeals from a judgment rendered against him by a justice of the peace, and that appeal is dismissed on his own motion, for want of prosecution or because of failure to perfect the appeal, the proper judgment to be entered in the circuit court is the amount for which judgment was rendered by the justice of the peace, with statutory damages and costs. This judgment goes against the appellants and the sureties on the appeal bond jointly. *Pass* v. *Payne,* 63 Miss., 239; Code 1892, § 85. In the instant case judgment should have been entered by the circuit court against appellants and the sureties on their appeal bond for the sum of $90, with statutory damages and all costs. The judgment which should have been entered in the court below will be entered here.

Judgment reversed at costs of appellee.

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Brief for appellant.

JOSEPH DUNK v. STATE OF MISSISSIPPI.

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1. CRIMINAL LAW. *Witnesses. Contradicting one's own. Hostile witness. Entrapped into introducing. Previous statements. Materiality.*

The state cannot contradict its own witness by showing his previous statements, unless entrapped into introducing a hostile one, and in such case only by showing statements which are material to the main issue.

2. SAME.

A district attorney, who calls a witness for the state without previous conference with him, cannot claim that he was entrapped and treat the witness as hostile, because his testimony is disappointing and not in harmony with what other persons had represented that it would be.

FROM the circuit court of Hancock county.

HON. WILLIAM T. MCDONALD, Judge.

Dunk, appellant, was indicted, tried, and convicted of the murder of one Nix, and was sentenced to death; he appealed to the supreme court from said conviction and sentence. The opinion states the facts upon which the case was decided by the supreme court.

W. H. Maybin, for appellant.

The court erred in admitting, over the objection of the defendant, the testimony of J. R. and T. E. Smith to contradict the testimony of Edgar Jones in reference to a statement not made by the defendant, but a statement made by Jones, a state witness, a statement made out of the hearing and out of the presence of the defendant. It is true that, after the district attorney had put Jones on the stand and discovered that Jones' testimony was not satisfactory, he claimed that he was surprised, but that does not cure the error, because it was matter that could not have affected the guilt or innocence of the

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Opinion of the court.

defendant, and yet, in permitting it to go to the jury, was prejudicial to the defendant.

J. N. Flowers, assistant attorney-general, for appellee.

The district attorney had been informed that one Edgar Jones would testify that he saw Dunk immediately after the killing and that he had a pistol in his hand. Dunk had been on the stand and testified that he did not have a pistol that afternoon. Jones was called as a witness for the state in rebuttal, and instead of saying that he saw Dunk with a pistol in his hand said Dunk did not have a pistol. The district attorney showed that he was taken by surprise, since he had had good reason to believe the witness would swear to the same thing he had told the two Smiths. He then put the Smiths on the stand and proved what Jones had told them. All this was permitted under the rule which affords parties some means of protection from designing or unreliable witnesses. It was for the presiding judge to determine whether the district attorney was taken by surprise. The action of the court in admitting this testimony was not error.

Argued orally by *W. H. Maybin,* for appellant.

TRULY, J., delivered the opinion of the court.

Appellant and William Parker were jointly indicted for murder. Severance was granted, and appellant placed on trial. The theory of the defendant on the trial was that the deceased came to his death in a single-handed mutual combat with Parker, the party with whom he was jointly indicted, and that he (the appellant) in no wise participated in the difficulty; that he was not immediately present at the time the shooting occurred, having left the scene when it became apparent that a difficulty was impending; and that he was not armed at the time. After the testimony in chief of both state and appellant had been introduced, the state called Edgar Jones as a witness in rebuttal, and sought to prove by him that he had arrested

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Opinion of the court.

the appellant immediately after the shooting, and that, when arrested, appellant had a pistol in his hand. Questions tending to elicit this proof, when propounded to the witness, were answered in the negative; and, while testifying to the fact of the arrest, he positively denied that the appellant had any weapon in his possession. Whereupon the district attorney claimed that he was surprised by the testimony of the witness, and was permitted, over the objection of appellant, to ask the witness if on the day of, and shortly after, the homicide, he had not stated to J. R. Smith and T. E. Smith that immediately after the shooting he had arrested the defendant, who at that time was armed, and had a pistol in his hand. The witness Jones denied having made such a statement. Thereupon the district attorney introduced said J. R. Smith and T. E. Smith, who both testified that Jones told them on the occasion in question that defendant had a pistol in his hand when arrested immediately after the shooting. One of the Smiths stated that "Jones told me that he got down there and threw his gun on Joe Dunk when he shot Nix." This portion of the statement was by the court excluded, but the other part of the testimony, over the repeated and earnest objections of counsel for defendant, was submitted to the jury for their consideration. We are at a loss to understand upon what reasoning this testimony was held to be competent. Had Jones been a witness for the defendant, and denied the statement attributed to him, still he could not have been impeached about a matter purely collateral to the main issue. It will hardly be contended that the state could rightfully have proven as a part of its case in chief that Jones had made this statement, for this would be hearsay, pure and simple. Whether Jones in fact made the statement was an irrelevant inquiry, not a substantive, probative fact relevant to the real issue involved, which was the guilt or innocence of the defendant. It tended neither to prove nor disprove any hypothesis arising out of the evidence, and was not a proper subject for contradiction. We can add nothing to the admirable and

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unanswerable reasoning of the court in *Williams* v. *State*, 73 Miss., 820 (19 South., 826), where this whole subject is most elaborately treated, and the admission of testimony contradictory of collateral issues condemned. In the case at bar the rights and interests of the defendant were lost sight of by the state, and the question of his guilt or innocence of murder was made dependent, in a certain sense, upon the jury's decision as to the veracity of the witness Jones. And yet, even if it be conceded that Jones committed perjury, this furnished no additional legal reason why appellant should have been sentenced to death. The general rule is that a party cannot attack the credibility of a witness introduced by himself. In the interest of fairness and justice, and to prevent parties litigant being defeated of their just rights by trickery, certain exceptions have been ingrafted on this rule; and, while a party may never impeach the general reputation of a witness whom he introduces in certain cases, when manifestly he has been entrapped into introducing a hostile witness, and is obviously surprised by the testimony, he is not bound thereby, and may show contradictory statements previously made by the witness. But even in such cases the contradictory statements must have been about a matter material to the real issue involved in the cause. In the instant case the district attorney had never heard the witness make any statement, but, depending on the story of others, introduced him without previous conference. He was therefore not entitled to invoke the rule devised to protect those who are entrapped by hostile or corrupt witnesses. The district attorney was probably disappointed by the testimony, but he had been neither misled nor entrapped by the witness. It is only in a rare and exceptional case, if ever, that a district attorney, whose duty it is to see that exact and even-handed justice is dealt out to all alike—to see that the innocent are protected and the guilty alone punished—should be permitted to attack the credibility of his own witness. Manifestly such course, under the facts disclosed by this record, constitutes reversible error. *People*

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Statement of the case.

v. *Safford,* 5 Denio, 112; *Dixon* v. *State,* 86 Ga., 754 (13 S. E., 87). Not only was the testimony subject to the objections indicated, but it was further prejudicial to appellant, and militated against his rights, in this: It cast upon his defense as presented to the jury the suspicion that his story of the homicide was false and concocted for the occasion, and that the witness Jones was endeavoring to befriend him by corruptly concealing the truth. The gravity of the error becomes more manifest when the circumstances attendant upon the homicide and the environment of the appellant are considered.

Reversed and remanded.

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ILLINOIS CENTRAL RAILROAD COMPANY v. ARTHUR ABRAMS.

1. PLEADINGS. *Declaration. Antagonistic causes of action. Same count.*

A declaration, with but one count, stating two antagonistic causes of action will not sustain a verdict for plaintiff on either cause of action, where the jury were instructed in respect to both and it cannot be ascertained which of the instructions were controlling.

2. SAME. *Master and servant. Railroads. Fellow-servants. Constitution* 1890, *sec.* 193. *Code* 1892, § 3559.

A cause of action predicated of the master's negligence, in failing to furnish his servant a safe place in which to work, is inconsistent and should not be joined in the same count with a cause of action arising from the negligence of a fellow-servant, based on Constitution 1890, sec. 193, and Code 1892, § 3559, modifying the common-law fellow-servant rule.

FROM the circuit court of Madison county.

HON. ROBERT POWELL, Judge.

Abrams, the appellee, was plaintiff, and the railroad company, the appellant, was defendant in the court below. From a judgment in plaintiff's favor the defendant appealed to the supreme court. The opinion states the case.

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Brief for appellant.

Mayes & Longstreet, and *J. M. Dickinson,* for appellant.

To put this case in a nutshell, our propositions are:

First—That while this suit is brought under sec. 193 of the constitution and under sec. 3559 of the code, it is not maintainable under those sections, for the reason that it is a case not within their intent.

The instance declared on is the simple case of a gang of carpenters engaged in putting a new roof on a house. They were not doing railroad work in the constitutional or statutory sense of that term; and if the constitution and statute should be considered as applicable to work of this character, then both the statute and the constitution would be violative of the fourteenth amendment of the constitution of the United States under the rule laid down by this court in the case of *Ballard* v. *Mississippi Cotton Oil Co.,* 81 Miss., 507.

Secondly—Even if this case did fall under the constitutional and statutory provision above, and even if such constitution and statute were not violative of the fourteenth amendment as above, then still the plaintiff was not entitled to a recovery, because the proof in the case clearly shows that if there was any negligence in the transaction at all (which for the purpose of argument we will concede is settled against us by the verdict of the jury), such negligence was that of a fellow-servant, not his superior officer, and one engaged in the same department of labor and on the same piece of work; wherefore it falls within the exception provided for both in the constitution and in the statute, and in his case would still be controlled by common law principles.

Grant that the negligence existed, still it is a case where the work in which the parties were engaged was a piece of common carpentering such as the gang might just as well have been employed in doing for any private citizen on any private property anywhere in the land. It was not railroad work, and there was no reason why any special rule of liability should be imposed in such case on the employer.

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Brief for appellant.

It seems idle for us to do more than cite the case of *Ballard* v. *Mississippi Cotton Oil Co.* The opinion of the court there was so full, the investigation of authorities was so exhaustive and complete, and the rule announced by the court was so clearly stated, that there is nothing left for us to do, except to cite it. It is true that the point directly decided in the Ballard case was that ch. 66, Laws 1898, was unconstitutional because it included all corporations; but that decision was reached by argument of this court, which throughout asserted the principles for which we now contend; and it is the argument of this court which we now cite and rely on.

But if the case had been properly tried under common law principles, there would have been no liability.

The point of negligence which is sought to be made out by the evidence was that the scaffold was insecure for the reason that the crosspiece on which the planks rested, or, as it is called in this evidence, the ledger, was nailed with eight-penny nails only, whereas ten's or twenty's ought to have been used; and, further, that when Stokes called on Mr. Eaton for larger nails, Mr. Eaton said that there were none larger.

The case is sought to be brought under the rule which existed at the common law in regard to the furnishing of a secure place for the employes to work in; but it does not fall under that rule. If the place was insecure, it was insecure because only of the failure of the plaintiff's own fellow-servant, engaged in the very same job, to make it secure by using properly those common and sufficient appliances with which they had been furnished by the railroad company.

It would be ridiculous to talk about the railroad company being under any legal obligation to furnish to the plaintiff a completed scaffold for him to work upon. All that the company could do was to furnish him and the gang to which he belonged with adequate and sufficient materials out of which to build the scaffold, and to furnish him with adequate and competent coemployes with whom to work (and this case does not proceed

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Brief for appellee.

upon the line that his co-employes were either insufficient in number or in qualification).

It is perfectly manifest that the whole trouble in this case grows out of the fact that plaintiff's fellow-carpenter, Stokes, did not use a sufficient number of nails in fastening the cross-pieces to the upright. He used only four eight-penny nails.

There are plenty of "scaffold" cases in the books. The distinction is perfectly well marked between a permanent place for employes to work in (including scaffolds or other structures of that nature) and a mere temporary scaffold, the erection of which is part of the job itself. *Marsh* v. *Herman,* 47 Minn., 537; *Lambuth* v. *Miss. Pulp Co.,* 72 Vt., 278; *Killea* v. *Faxon,* 125 Mass., 485; *Reynolds* v. *Barnard,* 168 Mass., 226; *Perigo* v. *Brewing Co.* (Ind.), 52 N. E., 462; *Hogan* v. *Smith,* 125 N. Y., 774; *Butler* v. *Townsend,* 128 N. Y., 105, 110; *Noyes* v. *Wood,* 102 Calif., 389; *Hoar* v. *Merritt,* 62 Mich., 336; *Beesley* v. *Wheeler,* 103 Mich., 196; *Benn* v. *Null,* 65 Iowa, 407; *Cole Co.* v. *Admr.,* 51 Ohio St., 542, 558; *Griffith* v. *Railroad,* 5 Misc. Rep. (N. Y. Sup. Ct.), 320; *Strange* v. *McCormick,* 1 Phil., 156; *Moore* v. *Railroad,* 167 Pa. St., 495.

A. K. Foote, for appellee.

If sec. 193 of the constitution only dealt with those employes engaged with the actual operation of trains, it would never have been questioned, even by railroad counsel, but it goes further, using the term "every employe," in plain, unequivocal language, not subject to the rule of *ejusdem generis,* as the general words "every employe" comes first and does not follow that part relating solely to employes operating trains; also not subject (in this State, at all events) to a process of judicial limitation, limiting these words to employes only who are engaged in the operating of trains. "Such action by a court is nothing less than judicial legislation pure and simple," says Chief Justice Whitfield in the Ballard case in speaking of the action of the Alabama, Iowa, and Kansas courts in cases involving the con-

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Brief for appellee.

struction of statutes similar to the provisions of our constitution. Sec. 193, then, must stand as a whole or fall as a whole. Chief Justice Whitfield's quotation from the case of *Smith* v. *L. & N. R. R. Co.*, 75 Ala., 449, in the Ballard case, states ably the reasons that have been advanced in support of the unconstitutionality of sec. 193, but we submit that the theory of the Alabama and other courts that have so held is wrong and not in accord with the decisions of the supreme court of the United States on the subject. The decisions above referred to were based on the erroneous theory that class legislation must operate on all alike—*i. e.*, not only on all within the class alike, but on those without alike also, if those without happen to be engaged in work similar to some particular kind those within the class engage in. For example, take the case at bar. Under the erroneous theory above referred to, sec. 193 would fall, because when the railroad (one of the class) happens to be building or repairing a depot, it is subjected to a different rule of liability for injury to its employes than an individual (one without the class) who happens to be building or repairing a house on an adjacent lot.

But such is not the true rule. The true test is this: "Does the classification operate equally on all within the class, and is there any substantial difference in the nature of the business as to warrant the classification?" If classification operates equally on all within the class, it makes no difference that there is inequality in some particular instances between members of the class and others out of the class, if in the first instance the classification is reasonable. *Tullis* v. *Lake Erie & W. R. Co.*, 175 U. S., 353 (44 L. ed., 194); *Magoun Case*, 170 U. S., 293 (42 L. ed., 1042); *Wenham* v. *State*, 58 L. R. A., 825, 826.

The fact that railroad corporations are engaged in a public business, the public character of that business, makes a sufficient difference for the maintenance of the classification. In *St. Louis, Etc., R. R. Co.* v. *Paul*, 173 U. S., 404 (43 L. ed.,

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Brief for appellee.

746; 19 Sup. Ct. Rep., 419), a statute subjecting railroad companies to a penalty for neglecting to pay any employe, whom they had discharged, with or without cause, or had refused to longer employ, the unpaid wages of such employe on the day of his discharge or the refusal to longer employ, was held constitutional. Chief Justice Fuller in that case said: "As this amendment rested on reasons deduced from the peculiar character of the business of the corporations affected and the public nature of their functions, and applied to all alike, the equal protection of the law was not denied." *Missouri P. Railway Co.* v. *Mackey,* 127 U. S., 295.

A case on all fours with the case at bar was recently decided by the supreme court of Missouri, in *Callahan* v. *St. Louis Merchants Bridge Terminal Railway Co.,* 60 L. R. A., 249, and it was held directly that the Missouri statute, which is similar to our constitution, did not violate the equality clause of the fourteenth amendment, although it did not confine the liability to acts performed in the operation of trains, but extended it to risks similar to those incurred by the employes of persons or corporations engaged in other lines of work.

Eugene A. Howell, on the same side.

Section 193 only applies to "any railroad corporation," and cannot be condemned for making an arbitrary classification, and is in fact a classification based upon a "substantial difference in the nature of the employment," and is not in conflict with the fourteenth amendment. This has already been repeatedly held. See *Barbier* v. *Connoly,* 113 U. S., 27 (28 L. ed., 923); *Soon Hing* v. *Crowley,* 113 U. S., 703 (28 L. ed., 1145); *Humes Case,* 115 U. S., 512 (29 L. ed., 463); *Mackey Case,* 127 U. S., 205 (8 Sup. Ct. Rep., 1161; 32 L. ed., 107); *Herrick Case,* 127 U. S., 211 (8 Sup. Ct., 1176); *Beckwith Case,* 129 U. S., 32 (9 Sup. Ct., 209; 32 L. ed., 585); *Pontius Case,* 157 U. S., 209 (15 Sup. Ct., 585; 39 L. ed., 675); *Ellis Case,* 165 U. S., 150 (17 Sup. Ct., 255; 41 L. ed., 666); *Ma-*

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Brief for appellee.

goun Case, 170 U. S., 293 (18 Sup. Ct., 594; 42 L. ed., 1037); *Paul Case,* 173 U. S., 404 (19 Sup. Ct., 419; 43 L. ed., 746); *Mathews Case,* 174 U. S., 96 (43 L. ed., 909); *Tullis Case,* 175 U. S., 348 (20 Sup. Ct., 136; 44 L. ed., 192); *Erb* v. *Morasch,* 177 U. S., 584 (44 L. ed., 897); *Sugar Refining Case,* 179 U. S., 89 (45 L. ed., 162); *Williams* v. *Fears,* 179 U. S., 270 (45 L. ed., 186); *Cargill* v. *Minnesota,* 180 U. S., 452 (45 L. ed., 619); *Kansas City Stock Yard Case,* 183 U. S., 79 (46 L. ed., 92); *Clark* v. *City Titusville,* 184 U. S., 329 (46 L. ed., 569); *Sewer Pipe Case,* 184 U. S., 540 (46 L. ed., 679).

Harris & Powell, on the same side

This suit was brought to recover damages for an injury sustained by the plaintiff by reason of the master's failure to perform a positive personal and continuing duty which was owing to the plaintiff, in that it failed to provide him with a reasonably safe place to work. This is the claim in the declaration. It was to this point that the testimony was directed.

In considering the instructions asked and refused for the defendant, the court will bear in mind the well-settled and elementary rule so familiar to the court: that the duty on the part of the master to furnish to employes a safe place to work is a personal duty which cannot be delegated. It is a responsibility which is continuing, and however humble the employe may be to whom this duty is assigned, the responsibility of the master continues and the question of fellow-servant cannot arise. In other words, the master cannot shift this responsibility and claim that the negligence in performing the duty or discharging the responsibility was that of a fellow-servant of the party injured. It is the master's duty, whoever undertakes to perform it.

Argued orally by *Edward Mayes,* for appellant, and *J. B. Harris,* and *E. A. Howell,* for appellee.

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Opinion of the court.

WHITFIELD, C. J., delivered the opinion of the court.

The declaration in this cause is rather a peculiar one. It seems chiefly to be a declaration framed on the ground that the defendant is liable because it failed to furnish the plaintiff a safe place in which to work; but it contains, also, isolated and scattered clauses in which it characterizes Eaton as "the superior officer entitled to control and direct the services" of the carpenter gang. And these clauses seem to be some sort of an attempt, in rather an obscure fashion, to hold the defendant liable under sec. 193 of the constitution of 1890 and § 3559, Code 1892. And here it is to be noted that the declaration contains only one count. It is not a case of a declaration stating a cause of action in one count one way, and in another count another way. It is the case of a declaration which states the cause of action in one count two ways, the grounds of liability being also inconsistent with each other. Section 193 of the Constitution was not needed to enforce a common-law liability based on the failure of the defendant to furnish a safe place in which to work; it was adopted, as we have heretofore pointed out, to abrogate the absurdities of the common-law fellow-servant rule —a wholly distinct matter from that of liability arising out of failure to furnish a safe place in which to work. The one relates to the liability of the master; the fellow-servant rule was used to defeat the liability of the master on the ground that not the master, but a fellow-servant, was liable. But here is a declaration with but one count embracing two wholly independent grounds of liability. This sort of pleading has been declared indefensible in the recent case of *So. Ry. Co.* v. *Bunnell* (Ala.), 36 South, 382.

But this is not all. It is manifested from the whole record, and the briefs of counsel, that the case was tried in the court below chiefly on the ground of liability under sec. 193 of the constitution, though both grounds of liability are shown by the record to have been presented; liability under sec. 193 of the constitution, however, having been presented only on the part of

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the plaintiff. The court below gave instructions for both sides —fair and correct instructions on the whole—as to the common-law liability; but it at the same time, curiously enough, gave the plaintiff one instruction which was, in effect, a peremptory instruction on defendant's liability under sec. 193 of the constitution, whilst at the same time refusing (we do not now say whether correctly or not as to the true construction of said sec. 193) all instructions asked by the defendant on this ground of liability. When the case gets to this court we find two elaborate arguments made by two of the counsel representing the appellee, resting their case on liability under sec. 193 of the constitution, and another able argument by another counsel for appellee, resting the cause on the common-law ground indicated. If the cause had been rested on the common-law ground of liability, and the action had proceeded on that theory throughout below and here, the plaintiff might have been entitled to a judgment, unless this case falls within the principle of the "scaffold cases" pressed on us by appellant. Whether this case is within that principle we leave an open question for the present. But in view of the peculiar character of the declaration in this case, the manifest course which the trial took in the court below, and the complete change of front in this court, it would, it seems to us, be a manifest injustice to affirm a judgment thus obtained. It is impossible to know to which instructions to refer the verdict. It is not a case for the application of the principle that the right result has been reached without reversible error having been committed. Reversible error has been committed, plainly and flagrantly, in putting, in a declaration with but one count, two antagonistic causes of action, and in respect also of the course pursued in giving instructions as to both these antagonistic causes of action under this peculiar declaration.

Reversed and remanded.

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Statement of the case.

JNO. K. NUTT, ADMINISTRATOR ET AL. v. SARGENT P. KNUT.

RES ADJUDICATA. *Second appeal.*

Where the supreme court reversed a decree in defendant's favor and adjudged complainant entitled to recover a certain per centum of money received by defendant and remanded the case for an accounting, the judgment is conclusive on a second appeal of complainant's right to recover.

FROM the chancery court of Adams county.

HON. WILLIAM P. S. VENTRESS, Chancellor.

Knut, appellee, was complainant, and Nutt and others, appellants, were defendants in the court below. From a decree in complainant's favor, the defendants appealed to the supreme court.

The case was heretofore in the supreme court, and the former decision is reported. *Knut* v. *Nutt,* 83 Miss., 365. It was decided on the first appeal that Knut, the present appellee, was entitled to one-third of the sum recovered for the estate of Haller Nutt, deceased, from the United States of America, through his services. After the case went back to the chancery court, Knut, appellee, filed a motion to refer the claim to a commissioner to state the amount due him. The cause was referred to a commissioner, who filed the account with his report, showing a balance due appellee, Knut, of $22,106.42. There was a final decree confirming this report and ordering that the administrator pay to Knut, appellee, the sum of $22,143.30, from which this appeal is prosecuted. The first assignment of error is set out in the opinion of the court. The only other assignment of error was that the decree rendered was erroneous in ordering the sum of $22,143.30 paid to Knut when the account of the commissioner appointed to take the account showed that only $22,106.42 was due him.

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Opinion of the court.

Brown & Martin, for appellants.

Catchings & Catchings, for appellee.

CALHOON, J., delivered the opinion of the court.

The first assignment of error is in these words: "First—The court erred in refusing to dismiss the petition of appellee, and in rendering any decree whatever in favor of appellee against John K. Nutt, administrator d. b. n. c. t. a. of estate of Haller Nutt, deceased." We cannot consider this, nor entertain the attempted appeal as to it, as we are without jurisdiction. It is an effort to relitigate an adjudicated controversy.

Heretofore, in this same case, with the same parties, in the same court from which comes the present attempted appeal, the petition referred to in the foregoing assignment of error was dismissed and appeal taken. On that appeal (*Knut* v. *Nutt et al.,* 83 Miss., 365, s. c., 35 South., 686) this court reversed that decision, sustained the petition of S. P. Knut, and ordered a final decree here as follows: "Reversed and decree here that S. P. Knut is entitled to his prayer for 33⅓ per centum of the amount collected by the administrator ($89,-993.83) in full for any advances made by him and all services rendered, and remanded for account to be taken accordingly, and for order that any balance of this per cent unpaid be paid to him by the administrator. Costs of both courts to be taxed on appellees."

The final decree here, according to this order, was entered on December 7, 1903, and the term expired March 6, 1904, and we are powerless now to change the law of the case pronounced at that term, even if we doubted its correctness, which we do not. So, as to that, there can be, and therefore is, no appeal pending. There was no motion for rehearing, nor suggestion of error presented. B. & A.'s Dig., 673, clause 49 *et seq.,* citing *Le Blanc* v. *Railroad Co.,* 73 Miss., 463, s. c., 19

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Statement of the case.

South., 211; *Lane* v. *Wheless,* 46 Miss., 666; *Cotten* v. *McGehee,* 54 Miss., 621.

In accordance with the mandate of this court, the court below proceeded to do all it could do, and that was to have an account taken and order the balance to be paid by the administrator to S. P. Knut. In doing this there was, on the face of the record in the present appeal, manifest error, by clerical misprision or inadvertence no doubt, in that the decree was rendered for $36.88 too much. It apparently should have been for $22,106.46, but was for $22,143.30, and this slight discrepancy is the basis of the second assignment of error, which is well taken, and for this the decree below is reversed, and we order a decree here for $22,106.46 against John K. Nutt, administrator *de bonis non cum testamento annexo* of the estate of Haller Nutt, deceased, in favor of S. P. Knut, and that the costs of this appeal be taxed against S. P. Knut, the appellee.

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UNION & PLANTERS BANK OF MEMPHIS *v.* BENJAMIN C. DUNCAN.

ASSIGNMENTS FOR BENEFIT OF CREDITORS. *Secured creditor. Right to dividend.*

Under a non-preferential assignment for the benefit of creditors, providing for the payment of liabilities ratably, a creditor who holds collateral security for his debt is not entitled to dividends upon the face of his claim without crediting the value of the collaterals.

FROM the chancery court of Grenada county.

HON. JAMES C. LONGSTREET, Chancellor.

The Union & Planters Bank of Memphis, the appellant, was complainant, and Duncan, the appellee, defendant in the

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Brief for appellant.

court below. From a decree in defendant's favor the complainant appealed to the supreme court.

On January 18, 1903, the Merchants Bank of Grenada, Miss., borrowed from the Union & Planters Bank of Memphis, Tenn., $10,000, and gave its note therefor; and, to secure this note, it assigned, as collateral security, a number of promissory notes held by it. On the 26th of January, 1903, the Merchants Bank of Grenada made a general assignment for the benefit of its creditors to Duncan, as assignee, who qualified as such. The assignment was without preferences, and provided that the estate should be applied toward paying "ratably the just debts and liabilities" of the assignor. At the April, 1903, term of the chancery court a dividend of 25 per cent was declared, and a commissioner was appointed to audit and report the claims entitled to share in the distribution. The commissioner made his report, and omitted the claim of the Union & Planters Bank. This report was accepted, and a decree was renderd ordering a distribution in accordance therewith. The Union & Planters Bank then filed its petition in the case, asking for allowance of its dividend in the distribution. The receiver answered the petition, setting up that petitioner should not be allowed to share in the distribution of the estate until it had either surrendered the collaterals held by it or had accounted for their value. Upon this there was a final decree rendered, providing that petitioner could surrender its collaterals to the receiver, and share in the distribution upon its entire claim, or account for the collaterals by deducting their face value from the debt, and receive dividends upon the difference between their value and the debt due it. This is the decree reviewed on appeal.

Horton & Horton, for appellant.

It is a settled principle of equity that a creditor holding collaterals is not bound to apply them before enforcing his direct

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Brief for appellee.

remedies against the debtor. *Lewis* v. *United States,* 92 U. S., 618.

A secured creditor of an insolvent debtor may prove and receive dividends upon the face of his claim, as it stood at the time of the declaration of insolvency, without crediting either the collaterals or collections made therefrom after such declaration. In this case, therefore, appellant is entitled to receive its dividend upon the sum of money due from the bank to it at the date of assignment—to wit, ten thousand dollars—without crediting either the value of the collaterals thereon or surrendering them up to the receiver. This is the rule in equity. *Merrill* v. *National Bank,* 173 U. S., 131; *Aldrich* v. *National Bank,* 176 U. S., 618; *Bank* v. *Haug,* 11 L. R. A., 327; *In re Meyer,* 11 R. L. A., 841; *People* v. *Remington,* 8 L. R. A., 458; *Meacham* v. *Pinson,* 60 Miss., 217; *Apperson* v. *Wilbourn,* 58 Miss., 440; *Levy* v. *Bank,* 30 L. R. A., 380; *Bank* v. *Armstrong,* 28 L. R. A., 231; *In re Miler's Estate,* 22 Am. Rep., 754; *In re Bates,* 59 Am. Rep., 383 (23 Am. & Eng. Ency. Law [2d ed.], 1118; 18 *Id.* [1st ed.], 677; 3 Am. & Eng. Ency. Law [2d ed.], 141; Story's Eq. Jur., secs. 560, 564b, 633; 3 Pom. Eq. Jur., sec. 1414; 84 Am. Dec., 479).

W. C. McLean, for appellee.

It is to be presumed, and conclusively presumed, that when the bank used in the deed of assignment the expression "ratably the just debts and liabilities of said party of the first part" it intended thereby to convey such meaning as the courts heretofore had almost universally placed upon such an expression. A critical examination of the opinions of Mr. Justice White in *Merrill* v. *Nat. Bank of Jacksonville,* 173 U. S., 152 *et seq.,* clearly establishes the proposition from the authorities that the universal rule applied in England and in this country in the distribution of insolvent estates has been to construe the word "ratably" to mean that a creditor who has security for his debt is only entitled to receive dividends upon the debt after

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Opinion of the court.

exhausting his security. If this be not done, there is no ratable distribution of the assets. See also opinion of Mr. Justice Gray, 173 U. S., 172 *et seq.*, and authorities cited in 173 U. S., 168. Lord Chancellor Eldon, in 1813, in *ex parte* Smith, 2 Rose, 63, said: "The practice has long been established in bankruptcy not to suffer a creditor holding security to prove, unless he will give up that security, or the value has been ascertained by the sale of it. The reason is converse: till his debt has been reduced by the proceeds of that sale it is impossible correctly to say what the actual amount of it is." The authorities *pro* and *con* upon this question will be found cited in footnote to *Merrill* v. *Bank,* 173 U. S., 168, 169. This court in *Davis* v. *Walker,* 51 Miss., 649, and in *Millsaps* v. *Bond,* 64 Miss., 453, enforces the well-recognized rule of equity that "where a creditor has a claim upon two funds, another having a claim to one of them may compel him to first go against that one to which the other has no claim."

Argued orally by *Wm. C. McLean,* for appellee.

WHITFIELD, C. J., delivered the opinion of the court.

The question in this case is whether the secured creditor of this insolvent bank may prove and receive dividends upon the face of his entire claim—his whole debt—without crediting his collaterals or collections made therefrom and without surrendering the said collaterals. It is a question upon which there is a great conflict in the authorities; but, after the maturest consideration, we prefer the view that such secured creditor is not so entitled, but must credit the value of the collaterals on the debt, and prove only for the balance. In view of the very able and very exhaustive consideration of this subject in the case of *Merrill* v. *Nat. Bank of Jacksonville,* 173 U. S., 131 (19 Sup. Ct., 360; 43 L. ed., 640), we deem it unnecessary to attempt any extended observations of our own. It is impossible for us to escape the conclusion that the better view is set forth

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in the opinion of the dissenting justices, delivered by Mr. Justice White, and we adopt the reasoning of that opinion as our own. We make just a few observations: These collaterals passed by the assignment to the assignee. The fact that they were held as collateral to the debt did not change the fact that they were a mere security for the debt. The assignment provides that the distribution shall be ratable amongst the creditors. We think Mr. Justice White demonstrates that "the rule in bankruptcy did not depend upon express statutory requirement, but, on the contrary, that it was simply a necessary outgrowth of the command of the statute that there should be an equal distribution of the bankrupt's assets." As said by Justice White: "True it is that, both in our own act of 1867 and in the English bankrupt act of 1869, there were inserted express provisions requiring a secured creditor to account for his collaterals before proving against the general assets. But this was but the incorporation into the statutes of the rule which had arisen as a consequence of the requirement for a ratable distribution, and which had existed for hundreds of years before the statutes of 1867 and 1869 were adopted. In other words, the express statutory requirement only embodied in the form of a legislative enactment what theretofore from the earliest time had been universally enforced, because of the provision for a ratable distribution." Mr. Justice White further says: "It was undoubtedly from a consideration of this fundamental rule of equity, in construing the statutory requirement for ratable division of general assets, that the bankruptcy rule was formulated. That rule, however, in effect, declared that secured creditors might retain their preferential contract rights in particular portions of the estate of the insolvent debtor, but that it was the purpose of parliament, in commanding ratable distribution, that general assets—that is, assets disincumbered of liens—should be distributed only among the general or unsecured creditors; the necessary effect being that a secured creditor could not prove against general assets with-

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out surrendering his security, thus becoming a general or unsecured creditor for the whole amount of the debt, or realizing upon the security, or in some form accounting for its value, in which latter contingency he would be general or unsecured creditor only for the deficiency. That the bankruptcy rule was deemed to be founded upon equitable principles, I think, is demonstrated by the statement of Lord Hardwicke in a case already mentioned (*Broomley* v. *Goodere,* 1 Atk., 77), where, after referring to the act of 13 Elizabeth, ch. 7, he said: 'It is manifest that this act intended to give the commissioners an equitable jurisdiction as well as a legal one, for they have full power and authority to take by their discretions such order and direction as they shall see fit, and this has been the construction ever since; and therefore, when petitions have come before the chancellor, he has always proceeded upon the same rules as he would upon cases coming before him upon the bill—the rules of equity.'" As well said by Lord Chancellor Eldon: "Till his debt has been reduced by the proceeds of that sale [that is, of the security], it is impossible correctly to say what the actual amount of it is."

This assignment expressly directs the distribution to be ratable; these collaterals pass *sub modo* by the assignment to the assignee; and, in any proper or just sense, it is impossible to say what the real debt due the secured creditor was until he had sold his collaterals and applied the money in reduction of his debt, and that balance of debt thus remaining constitutes the debt upon which alone he can prove. We add, to approve them, the observations of Chief Justice Parker and of Chief Justice Shaw. The former said in *Amory* v. *Francis,* 16 Mass., 308: "If it were not so, the equality intended to be produced by the bankrupt laws would be grossly violated, and the creditor holding the pledge would in fact have a greater security than that pledge was intended to give him. For originally it would have been security only for a portion of the debt equal to its value; whereas, by proving the whole debt and holding

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the pledge for the balance, it becomes security for as much more than its value as is the dividend which may be received upon the whole debt." The latter said in *Farnum* v. *Boutelle,* 13 Metc. (Mass.), 159: "If the mortgage remained in force at the time of the decease of the debtor, then it is very clear, as well upon principle as upon authority, that the creditors cannot prove their debt without first waiving their mortgage, or in some mode applying the amount thereof to the reduction of the debt, and then proving only for the balance."

It follows from these views that the decree is affirmed.

CALHOON, J., dissented.

WEAVER HORTON v. STATE OF MISSISSIPPI.

1. CRIMINAL LAW. *Attempt. Conviction of under indictment for the crime. Code* 1892, § 1426. *Rape.*

Code 1892, § 1426, providing that on an indictment for any offense the jury may convict the defendant of an attempt to commit it, is applicable to the crime of rape, and a defendant's instruction excepting it therefrom was properly refused.

2. SAME. *Character.*

On a trial for rape it is error to refuse to admit testimony on behalf of defendant of his general reputation for peace or violence.

FROM the circuit court of Lauderdale county.

HON. GUION Q. HALL, Judge.

Horton, appellant, was indicted, tried, and convicted of rape, and appealed to the supreme court. The second instruction asked by defendant and refused by the court, mentioned in the opinion, was in the following words—viz.: "The court charges the jury, for the defendant, that they cannot find the defendant guilty of an attempt to commit rape, under this indictment, there being no second count charging such offense."

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F. V. Brahan, for appellant.

The court erred in excluding the testimony of Mr. Brewster and other white friends of defendant as to his good character for peace or violence. Force, or violence, is the gist of this offense, and it therefore follows that proof of good character, as was offered, is proper in such cases. In *Brown* v. *State,* 72 Miss., 998, such proof was admitted, and the only criticism made by this court on such ruling was that it was error to admit certain facts on cross-examination of defendant's character witnesses, which was objected to. Here was a negro boy, barely of age, being tried by a strange jury, whom he had never seen before, and he ought to have been permitted to have proven his previous good character by his white friends, with whom he lived and who knew his general reputation.

William Williams, attorney-general, for appellee.

TRULY, J., delivered the opinion of the court.

The refusal of the second instruction asked by the defendant was not error. Section 1426, Code 1892, provides that "on an indictment for any offense the jury may find the defendant guilty of the offense as charged or of any attempt to commit the same offense." It is not necessary, nor would it be proper, to join in the indictment a second count charging an attempt to commit the crime charged.

The language attributed to the district attorney is not made known to us in the manner prescribed by law. This assignment of error, therefore, is not considered. *Powers* v. *State,* 83 Miss., 691, s. c., 36 South., 6.

It was fatal error to refuse to admit the testimony offered on behalf of defendant of his general reputation for peace or violence. This was the particular trait involved in the prosecution against the defendant, and testimony showing an established reputation for peace and quiet is especially appropriate in this class of cases. *Maston* v. *State,* 83 Miss., 647, 36 South.,

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71; *Hardtke* v. *State,* 67 Wis., 552 (30 N. W., 723); *State* v. *Lee,* 22 Minn., 407 (21 Am. Rep., 769); *Lincecum* v. *State* (Tex. App.), 15 S. W., 818 (25 Am. St. Rep., 727).

Reversed and remanded.

ALEXANDER TIDWELL *v.* STATE OF MISSISSIPPI.

1. CRIMINAL LAW. *Instructions. Evidence. Want of. Weight of.*

Instructions in a criminal case, as well as a civil one, should be refused if they be upon the weight of the evidence or if there be no evidence of which to predicate them.

2. SAME. *Homicide. Insanity.*

In a prosecution for homicide, a requested instruction that if the defendant received a blow on his head which affected his mind to some extent, and that, when under excitement or anger, such affection caused him to lose mental control of himself, together with mental control of his power to distinguish between right and wrong, and that, at the time of the killing, defendant was laboring under great mental excitement, and entertained no malice towards deceased, but merely wished to protect himself, and that the affection of his mind produced a mental delusion magnifying the extent of his danger, and that, while laboring under such delusion, and without malice, he shot and killed deceased, or, if the jury had a doubt as to the truth of such facts, they should acquit defendant, was properly refused, as improperly drawn, and on the weight of evidence.

3. SAME.

An instruction in a prosecution for homicide that if defendant's mind was measurably impaired by a blow on his head, and, while ordinarily sane, his mind would become so disordered under excitement as to cause him to lose power to distinguish between right and wrong, and was laboring under such disorder at the time of firing the fatal shot, and magnified, through a delusion, the danger to which he was exposed, and, without malice, and with a perfectly sincere belief that he was in immediate danger of death at the hands of deceased, fired the

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fatal shot, he should be acquitted, was properly refused, as an inaccurate statement of the law, and on the weight of evidence.

4. SAME. *Evidence of wastefulness.*

In a prosecution for homicide, evidence that defendant would spend his substance in purchasing articles for which he had no special use, and that he neglected to provide for the future support of his family, did not constitute proof of insanity.

FROM the circuit court of Holmes county.

HON. WILLIAM F. STEVENS, Judge.

Tidwell, the appellant, was indicted, tried, and convicted of murder, and appealed to the supreme court.

The evidence showed that Tidwell went with an officer and some other men to a house to arrest a man one night. Graves came up toward the house, and was mistaken by Tidwell for the man they were looking for, and Tidwell shot Graves, slightly wounding him. Graves became angry, and said: "I will get even with you if I live." A few days after this occurrence, Graves and Tidwell went into a neighboring town, and went home on the same wagon. After they had gotten out of town, Tidwell insisted that Graves accept his apology and explanation of the shooting, but Graves declined to make friends with him. Tidwell had a shotgun with him, he says, to protect himself, as Graves had threatened to kill him. Tidwell further testified that Graves threw down a paper sack he had in his hand, and put his right hand behind him, as if to get a pistol from his pocket, and he immediately shot him from the rear. Graves died immediately from the effects of this shooting. Some testimony was taken in the effort to show the temporary insanity of Tidwell at the time of the shooting. The court refused the following instructions asked by the defendant:

"No. 1. The court instructs the jury that if they believe from the evidence that Tidwell received a blow upon his head some years ago, which affected his mind to some extent, and that, when under excitement or anger, this affection of the mind caused him to lose mental control of himself, and, along with his mental control, the power to distinguish between right and

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Brief for appellant.

wrong, and that, at the time of the killing, defendant was laboring under great mental excitement, and entertained no malice against Graves, and merely wished to protect himself, and that the affection of his mind caused by such injury produced a mental delusion magnifying the extent of danger to which he was then exposed, and that while laboring under such delusion, and without malice, he shot and killed Graves, or, if the jury have a doubt as to the truth of these facts, then they should find the defendant not guilty.

"No. 2. The court instructs the jury that if they believe from the evidence in this case that Tidwell's mind was measurably impaired by a blow on his head, and that, while ordinarily sane, his mind would become so disordered under excitement as to cause him to lose the power of distinguishing between right and wrong, and that he was laboring under such disorder at the time of firing the fatal shot, and magnified, through a delusion, the danger to which he was exposed, and without malice, and with a perfectly sincere belief that he was in immediate danger of death at the hands of Graves, fired the fatal shot, then the jury will acquit Tidwell."

Noel, Pepper & Elmore, for appellant.

There being evidence before the court that appellant had received a blow on the head, five or six years before, which made him senseless for about two weeks, and that his mind had been defective ever afterwards, and that under fear and excitement, where his own life was concerned, he might magnify the danger to which he was exposed and kill any one, two instructions were asked on that line. Both were refused. These instructions asked the court to leave to the jury the question of appellant's mental condition under excitement as affecting the question of malice; if they believed he had received a blow on his head which affected his mind, and that when angered this affliction caused him to lose self-control and the power to distinguish between right and wrong, and that he was under such

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excitement, and entertained no malice when the fatal shot was fired, they should acquit.

The question presented does not relate to the weight of evidence, but turns upon the question of whether or not there was any evidence of such impairment of mind that the question should have been submitted to the jury; and this question we submit to this court.

J. N. Flowers, assistant attorney-general, for appellee.

No such showing as to probable insanity was made as to require the state to go into this investigation or to assume the burden of proving sanity. Since this is true, it was not error for the trial court to refuse instructions defining the law as to the responsibility for crime of persons acting under delusions. This issue was not presented. It will not be required of trial judges that they chase off after every suggestion of counsel. No man was ever tried for murder in whose life conduct could not be found to suggest, when detailed before a jury at the trial, temporary insanity. The courts will require a respectable showing to be first made before they take up or recognize this issue. The rule is stated by this court in *Ford* v. *State*, 73 Miss., 734, 739, as follows: "The burden of proof never shifts in a criminal case. It is true that every man is presumed to be sane. It is also true that this presumption of sanity will be sufficient to sustain the burden resting on the state of proof of sanity on the part of defendant at the time of the commission of the act charged, if defendant offers no testimony to meet the presumption sufficient to raise, out of the evidence in the case, a reasonable doubt of the defendant's sanity at the time he committed the act."

It is for the trial judge to determine whether the defense has made such showing as to call for rebuttal testimony.

TRULY, J., delivered the opinion of the court.

The action of the court in refusing the two instructions denied the appellant was correct. The instructions are erro-

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neously drawn, and do not state accurately the proposition of law which it was sought to announce, and they fall within the condemnation of the statute which prohibits the jury being charged as to the weight of evidence. In addition to this, the record contains no testimony upon which to base the theory of partial or temporary insanity sought to be availed of on behalf of the appellant. The fact that he was excitable and emotional, and the further fact that he would spend his substance in purchasing articles for which he had no special use, and neglect to provide for the future support of his family, are simply racial characteristics, and cannot properly be considered any proof of insanity. The crime which appellant committed was atrocious and unprovoked, and he should be thankful for the leniency displayed by the jury in not affixing the death penalty.

Affirmed.

LOUIS HUFFMAN v. STATE OF MISSISSIPPI.

1. CRIMINAL LAW. *Autrefois convict. Constituent crime. Misdemeanor. Felony.*

The conviction of a defendant by a justice of the peace of a misdemeanor is not a bar to an indictment for a felony of which the misdemeanor is a constituent; such a conviction for an assault and battery does not bar an indictment for an assault and battery with intent to kill and murder predicated of the same acts.

2. SAME. *Code* 1892, § 1340. *Constitutional law. Constitution* 1890, *sec.* 22. *Jeopardy.*

Code 1892, § 1340, providing that the conviction of a defendant by a justice of the peace for a misdemeanor shall not bar a prosecution for a felony in the same matter is not violative of Constitution 1890, sec. 22, declaring that a person shall not be twice placed in jeopardy for the same offense.

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Brief for appellant.

FROM the circuit court of Tate county.

HON. J. B. BOOTHE, Judge.

Huffman, appellant, was indicted, tried, and convicted of an assault and battery with intent to kill and murder one Stephen Franklin, and appealed to the supreme court.

Defendant filed a plea of former jeopardy, alleging that he had already been convicted on a charge of assault and battery, and that said charge was of and for the same offense set out in the indictment. The state, by its demurrer, admitted that defendant was tried and convicted by a justice of the peace of an assault and battery upon said Franklin, and that it arose out of the same occurrence and state of facts as the charge made by the indictment, all of which was shown by the plea. The plea was held bad and the demurrer to it was sustained. It was contended for appellant that § 1340, Code 1892, is unconstitutional, it being in conflict with sec. 22 of the constitution of 1890.

S. W. Jones, for appellant.

It is true that we have a statute which provides that notwithstanding a person may be convicted in a justice's court of a misdemeanor, he may be afterwards prosecuted for a felony growing out of and including such misdemeanor, and if the court should hold this statute (1340) constitutional, it would be useless to pursue this argument further, but I hold that this statute amounts to no more than the blank paper upon which it is written.

No person's life or liberty shall twice be put in danger of punishment for the same offense. This privilege, like many other valuable guaranties in criminal cases, is not the creature of the constitution, but has its roots deeply imbedded in the universal principles of reason and justice, and derives its substance from the ancient and uninterrupted rules and practice of the common law. Black's Constitutional Law, 586; 91 Am.

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Brief for appellant.

Dec., 773; 9 Am. Dec., 481. It "is as sacred as the right of a trial by jury, and is guarded with as much care by the common law and by the constitution." 55 Am. Dec., 543.

It was this that the common people of England forced the king at the point of the sword to reincorporate into the great charter of liberty; it was this that made the Federal constitution so objectionable to our forefathers and so hotly contested when being ratified by the several states, and it is this that has rendered the fundamental principles of our criminal law inviolable by any department of the government.

In a criminal transaction there may be more than one crime; or, in other words, there may be a crime within a crime—as, for instance, there may be a larceny within the crime of burglary, or manslaughter within a crime of murder, or a man may be guity of arson, of burning a house wherein a human being is consumed, and so by the same act be guilty also of murder; a crime may be composed and built up of several crimes, each of which is less in degree than each succeeding crime. Take for example this case. The defendant was indicted for assault and battery with the intent to kill. Here, then, are three crimes: assault, which constitutes the least crime; then assault and battery; and then the assault and battery with the intent to kill.

The question before your Honors is whether or not the defendant can be punished for the last offense after having been convicted for the two lesser. The state must choose the crime for which it intends to prosecute, and after this has been done and the defendant has been placed in jeopardy for that one, it cannot afterwards prosecute on the other. In this case the state chose the crime of assault and battery. It could have selected either one of the other two. It had the free and untrammeled right in exercising its powers, in making its choice, and should have from thence and thereafter been estopped from choosing another. 92 Am. St. Rep., 86.

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J. N. Flowers, assistant attorney-general, for appellee.

Section 1340 of the code cannot be held to be an infringement upon the constitutional provisions protecting persons from having their life or liberty placed in jeopardy more than once for the same offense. Under an indictment based upon the same facts one can be convicted only of a felony, and not for the constituent misdemeanor of which he has already been convicted.

It is not thought necessary to search for authorities to meet those presented by counsel for appellant, since his position seems unreasonable. If the conviction by a justice of the peace of a misdemeanor were held to be an acquittal of the felony committed at the same time and to be proved by the same facts, but embracing such misdemeanor, then justices of the peace would be overwhelmed with business. It would be an easy matter to settle every case of this kind with fine and costs, and every criminal would hasten to the justice of the peace to get such protection. The conclusion is too plain for discussion.

TRULY, J., delivered the opinion of the court.

Appellant's plea of former jeopardy was properly overruled. There was no identity of the offense for which he was here tried and the one of which he had been convicted before a justice of the peace. The fact that it arose out of the same occurrence and state of facts did not render the present prosecution improper. *Smith* v. *State,* 67 Miss., 117 (7 South., 208). The justice of the peace before whom appellant was convicted of assault and battery was without jurisdiction to try and determine the offense for which he is now on trial, and this element is essential to the sufficiency of a plea of autrefois convict. Section 1340, Rev. Code 1892, is not in conflict with, nor violative of, sec. 22 of the constitution of 1890. We think it unnecessary to elaborate this view, as the doctrine is firmly established in many jurisdictions. Am. Dig. (Cent. ed.), vol.

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14, col. 1007; *State* v. *Nichols,* 38 Ark., 550; *White* v. *State,* 9 Tex. App., 390; *Commonwealth* v. *Reed,* 4 Lanc. Law Rev., 89. Any other view than the one here announced would lead to endless confusion and uncertainty in the prosecution of crime in this state.

Affirmed.

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WILLIAM S. HARKLEROAD *v.* KATE BASS ET AL.

1. WILLS. *Construction. Technical words. Heirs. Presumption.*

If it be apparent from a will that the testator used the word "heirs" in a different sense, the presumption that he used it in its technical sense will not prevail.

2. SAME. *Case.*

Where the manifest object of the will was to provide for the testator's infant son, and it gave him lands for life and provided "should he leave any lawful issue at his death then I will to his heirs forever, and should (he) die without heirs" the lands were to go to testator's grand-niece, the word "heirs" was used in the sense of "lawful issue," and upon the death of the son without issue the grand-niece took the estate.

FROM the chancery court of DeSoto county.

HON. JULIAN C. WILSON, Chancellor.

Harkleroad, appellant, was complainant, and Mrs. Bass and others, appellees, defendants in the court below. From a decree in defendants' favor complainant appealed to the supreme court.

Complainant claimed under the will of Hiram S. Harkleroad, deceased, which is made an exhibit to the bill, as the heir at law and next of kin to Daniel S. Harkleroad, deceased, son of Hiram S. Harkleroad, the deceased testator. Such parts of the bill and so much of the will as is necessary for an understanding of the case are set out in the opinion of the court.

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Brief for appellant.

The defendants demurred to the bill, and the demurrer was sustained and the bill dismissed.

Finlay & Finlay, for appellant.

It is obvious that the primary object of the will was to provide for the care and education of the testator's young son and to regulate his rearing and education as much as possible. Having accomplished his purpose, it was but natural that the testator should provide that at the death of Daniel his lands should descend as the law of the land provides, for that is the effect of the twelfth item, unless we read into it a meaning different from that imported by the words used.

The word "heirs" is used five times in this will, four times in the twelfth clause and once in the fifth clause. It is perfectly obvious that in the fifth clause the testator did not use the term to designate children of descendants, but used it in its legal sense. He directs that the one hundred and twenty acres devised to Mrs. Williams shall at her death go to Kate Williams and to her heirs forever. In the twelfth clause the limitation over to Kate Williams is to her and to her heirs forever. Thus the testator in two instances out of five used the term in its technical sense and as a word of art.

There is nothing connected with the use of the word in the other three instances in the twelfth clause, and nothing in the context, which would indicate in the slightest degree that the testator used it in a different sense from the sense in which it is used in the other two instances. It therefore follows that the word is to be construed in its technical sense in each instance.

Mr. Jarman's XVII. General Rule of Construction, 3 Jarman on Wills, ch. 51, p. 707, is as follows:

"That words, occurring more than once in a will, shall be presumed to be always used in the same sense, unless a contrary intention appear by the context, or unless the words be applied to a different subject."

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Brief for appellees.

We therefore submit that, independently of other considerations, in the light of the other provisions of this will, and in view of the use of this term in other instances in the will, the words "lawful heirs" must be construed to mean, as claimed by the appellant, those entitled under the statute to succeed to the real estate of Daniel S. Harkleroad at his death, and not to mean his lineal descendants.

Mr. Jarman's XVIII. General Rule of Construction is: "That where a testator uses technical words, he is presumed to employ them in their legal sense unless the context clearly indicates to the contrary." 3 Jarman on Wills, ch. 31, p. 707.

The word "heir," when unexplained by the context, must be interpreted according to its strict legal import, in which sense it obviously designates the person or persons appointed by law to succeed to real estate in case of intestacy. 2 Jarman on Wills, 586; *Beers* v. *Narramore,* 61 Conn., 14; *Walsh* v. *McCutcheon,* 71 Conn., 283; *Gauch* v. *St. Louis, Etc., R. R. Co.,* 88 Ill., 252; *Carpenter* v. *Van Olinder,* 127 Ill., 42; *Putnam* v. *Gleason,* 99 Mass., 454; *Barber* v. *Pittsburg, Etc., R. R. Co.,* 166 U. S., 83.

"The proposition deducible from the authorities is that, *prima facie,* the word 'heir' is to be taken in its technical sense, unless there is in the will a plain demonstration that the testator used it in a different sense, in which case effect will be given to his intention." *Irvine* v. *Newlin,* 63 Miss., 192.

Farley & Lauderdale, L. J. Farley, and *Tim E. Cooper,* for appellees.

The contention of appellees is that the word "heirs" in the twelfth item of the will was used by the testator in the sense of children, or issue, and that said item should be construed as if written: "I give and bequeath to my son Daniel all my real estate, to have and to hold the same during his natural life, and should he have any lawful children at his death," etc.

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Brief for appellees.

This was the intention of the testator, as is clearly shown from a consideration of the whole will. The intention of the testator in construction of wills governs and must be ascertained by looking at and considering the whole will. *Vannerson* v. *Culbertson*, 10 Smed. & M., 150; *McGehee* v. *McGehee*, 74 Miss., 386; *Johnson* v. *Delome, Etc., Co.*, 77 Miss., 15.

It is well settled that the technical and legal meaning of words will not be considered when the clear intent of the testator, as shown by his will, was to give a different meaning to any particular word, like the word "heirs" in the twelfth item of this will. *Johnson* v. *Delome, Etc., Co.*, 77 Miss., 15; *Lusby* v. *Cobb*, 80 Miss., 715; *Baird* v. *Boucher*, 60 Miss., 326.

The common law rule, vesting title in the heirs by descent, will not apply in this case, because the will contains other provisions, with which that application would not consist. *Dunlap* v. *Fant*, 74 Miss., 197.

It has been held that words may be even rejected or may be restrained in their application in order to give effect to the intention of the testator. *Finlay* v. *King*, 3 Pet. (U. S.), 346, in which this language is used by Chief Justice Marshall: "But the intent of the testator is the cardinal rule in the construction of wills, and if that intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail, although in giving effect to it some words should be rejected or so restrained in their application as materially to change a literal meaning of the particular sentence."

One of the most frequent illustrations of these rules is found in the decisions of all the courts construing the words "heirs" and "lawful heirs" to mean children only, as clearly was the intention of the testator, Hiram S. Harkleroad, in his use of the words in this will.

"If a son should die without heirs of his own," has been held by the supreme court of the United States, in the case of *Abbott* v. *Essex Co.*, 18 How., 202, to mean lineal descendants or children. In *Davis* v. *Davis*, 39 N. J., Eq. 13, the words

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"lawful heirs" were construed to mean legitimate children. And in *Eldridge* v. *Eldridge,* 3 Cen. Rep., 345 (41 N. J., 89): "That if clearly shown that the word 'heirs' was used as meaning children, the court will give it that meaning." So the word "heirs" may be read to mean children, if the context distinctly shows that it was employed in that sense by the testator, just as it does in this case. *Allen* v. *Craft,* 7 W. R., 516; *Anthony* v. *Anthony,* 5 N. E. Rep., 41; *McCarthy* v. *Osburn,* 6 W. R., 793.

So, when a will provides to pay over to the widow if living $3,000, provided the son leaves no heirs, the word "heirs" means children. *Anthony* v. *Anthony,* 5 N. E. Rep., 41 (2 Pick., 243, and 4 Pick., 198).

Argued orally by *Percy Finlay,* for appellant, and by *Tim E. Cooper,* for appellees.

TRULY, J., delivered the opinion of the court.

The twelfth clause of the last will and testament of Hiram S. Harkleroad is as follows: "12. I give and bequeath to my son Daniel all my real estate, to have and to hold the same during his natural life, and should he have any lawful issue at his death, then I will to his heirs forever, and should my son Daniel die without heirs, then in that case I will all my estate, both personal, mixed, and real, to my grand-niece, Kate Williams, and to her heirs forever." At the date of this will Daniel Harkleroad was an infant, about five years of age. He lived for some years after his father's death, and died unmarried and leaving no lawful issue. At his death the appellee, Kate Williams, now Bass, the grand-niece of Hiram S. Harkleroad named in the clause recited, entered into possession of the lands which the said Daniel took by devise from his father. At his death Daniel left surviving him the said Kate Williams, his cousin in the second degree, and nine first cousins, nieces and nephews of Hiram S. Harkleroad. This suit was instituted

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by the said nephews and nieces, averring that, as the nearest of kin in degree to the said Daniel, they inherited to the exclusion of the said Kate Williams. The sole question presented for decision is as to the true interpretation of the twelfth clause of the will of Hiram S. Harkleroad.

Appellants, complainants below, contend that the devise of the estate of Kate Williams made by the said clause, in the event Daniel Harkleroad should die wthout heirs, is ineffective because the contemplated contingency did not arise; that the devisee of the life estate did not die without "heirs" in the legal signification of that term, and therefore the limitation over fails. So, appellants argue, they are the heirs at law of Daniel Harkleroad, and, as collaterals nearest in degree, they inherit to the exclusion of other kin more remote. This contention is predicated of the generally recognized rule of interpretation which is concisely and accurately stated by Campbell, J., in *Irvine* v. *Newlin,* 63 Miss., 196, where it is said: "The proposition deducible from the authorities is that, *prima facie,* the word 'heir' is to be taken in its technical sense, unless there is in the will a clear demonstration that the testator used it in a different sense, in which case effect will be given to his intention." This statement of the rule cannot be improved.

The inquiry for our determination is whether the testator intended to attach a special and different meaning to the term "heir" as used in this clause of his will. Unless such intention is manifest, it is presumed that the testator employed technical words in their legal sense. Jarman, Wills, vol. 3, p. 707. An examination of the will now being considered demonstrates that the main object which the testator sought to attain was to amply provide for his only son during his life. Several different provisions of the will evidence his great solicitude on this point. Having guarded the interests of his son Daniel, so far as human foresight enabled him, the testator then states what disposition he desires made of his estate after

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the death of his son. His wishes are plainly set out in the twelfth clause of his will: (1) He bequeaths to his son Daniel all his real estate, "to have and to hold the same during his natural life." (2) Should Daniel have "any lawful issue at his death," the estate vests in "his heirs forever." (3) Should Daniel die without "heirs," the estate is to go to his grand-niece, Kate Williams, and her heirs forever. Subjected to analysis, the clause demonstrates that the testator used the term "heirs" to convey the meaning of "lawful issue." If, says the testator, my son has "lawful issue" at his death, his "heirs" shall inherit. What heirs? Manifestly the lawful issue surviving him. If, however, the son dies without heirs (described in the preceding sentence of the same clause as "lawful issue"), then the grand-niece of the testator and her heirs inherit. No other construction will harmonize the several distinct provisions of the clause. To our minds the conclusion is inescapable that this clause devised a life estate in the lands to Daniel, with a limitation over to the heirs of his body who, lawfully begotten, might survive him, and in default thereof to Kate Williams and her heirs forever. That this was the real intention of the testator is demonstrated by the text of the will.

The unsoundness of appellant's contention that the word "heir," in the connection now being considered, is to be given its technical, legal meaning, becomes the more apparent when it is noted that the devisee of reversionary interest after the termination of the life estate was herself an "heir," in the legal sense of that term, to the holder of the life estate. If Daniel died without "heirs," Kate Williams was to inherit. But, if appellant's interpretation be correct, Daniel could not possibly die without heirs so long as Kate Williams lived, for she was herself an heir, in that sense, both to Hiram and Daniel. Hence to adopt the construction urged by appellant would be to render the clause contradictory within itself and inoperative; whereas, if the term be interpreted in the light of the context,

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Statement of the case.

it effectuates the intention and desire of the testator, and vests the estate in the person expressly selected and named in the will. That this conclusion is in accordance with the almost universal current of decision, see the careful, full, and discriminating citation of authorities in the excellent brief for appellees.

The decree is affirmed.

GULF & CHICAGO RAILROAD COMPANY v. FUQUA HORTON.

1. CARRIERS. *Liability for freight. Notice of arrival.*

The liability of a common carrier of goods as carrier continues until a reasonable time for their removal has elapsed after the carrier gives the consignee notice of their arrival at the point to which they were shipped.

2. SAME. *Custom not to give notice.*

A custom of a common carrier not to give notice to the consignee of the arrival of goods will not terminate its liability as carrier, but the same will continue until such notice is given.

FROM the circuit court of Pontotoc county.

HON. EUGENE O. SYKES, Judge.

Horton, appellee, was plaintiff, and the railroad company, appellant, was defendant in the court below. From a judgment in plaintiff's favor the defendant appealed to the supreme court.

Appellee was a merchant doing business about seven miles from Pontotoc, Mississippi. He purchased a bill of goods in Memphis, which was shipped to Pontotoc on the 4th of February, 1903, and on the 14th of February, 1903, the railroad depot at Pontotoc was destroyed by fire, and this bill of goods was destroyed in the fire. No notice was given to plaintiff of the arrival of the goods at Pontotoc. There was evidence to show that there was a custom of appellant company not to

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Brief for appellee.

give notice to consignees of the arrival of freight. The court below gave a peremptory instruction for plaintiff.

J. W. T. Falkner, and *Fountaine & Fountaine,* for appellant.

The appellant in this cause is not liable as a common carrier, but could only be made liable as warehouseman. The goods reached their destination on the 7th day of February, 1903. While there is some conflict in the evidence, our contention is that at the time of the arrival of the goods and the burning of the depot, there was no law in this state requiring such notice to be given; on the contrary, it was the law that notice to consignees by railroads of the arrival of freight depends upon the custom of the company. *New Orleans, Etc., R. R. Co.* v. *Tyson,* 46 Miss., 729.

The proof is clear and uncontradicted that there was no custom of appellant to give notice to consignees of the arrival of freight.

Mitchell & Fletcher, for appellee.

Until the consignee has been notified of the arrival of the goods, the liability of the transportation company continues to be that of a common carrier. We are, of course, aware of the great diversity of opinion on this question in the courts of the several states, and admit that until recently the course of the Mississippi courts was problematical. But since the rendition of the opinion in the recent case of *Alabama & Vicksburg R'y Co.* v. *Pounder,* 82 Miss., 568 (s. c., 35 So. Rep., 155), we think the question has been removed from the field of speculation. It is true that the exact point was not directly involved, and was perhaps not squarely before the court, but the clear and unmistakable language of the opinion stating that this court preferred to ally itself with those states holding that notice is necessary, leaves no room for doubt that the so-called New Hampshire rule has been adopted in this state.

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Opinion of the court.

Argued orally by *R. V. Fletcher,* for appellee.

TRULY, J., delivered the opinion of the court.

The liability of a railroad company as a common carrier does not terminate until the freight has reached the point of destination in good order, notice of its arrival has been given to the consignee, and a reasonable time allowed for its removal. This is the law, irrespective of any custom on the part of railroad companies. *Alabama & V. Railway Co.* v. *Pounder,* 82 Miss., 568 (s. c., 35 South., 155). There is no merit in the contention that, as the loss occurred prior to the decision in that case, the appellant is not liable. In the instant case the undisputed proof is that no notice was given appellee of the arrival of his freight. There was, therefore, nothing for the jury to pass upon, and the peremptory instruction was properly granted.

Affirmed.

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Brief for appellant.

CALVIN B. BENNETT *v.* HENRY BENNETT, JR., ET AL.

1. PARTITION. *Accounting. Improvements. Rents. Taxes. Lien.*

In a suit for partition of land:

(*a*) An occupying tenant in common is not liable to his co-tenants for rents, unless he has occupied more than his proportionate share of the land, and then only for the rent of the excess.

(*b*) A tenant in common is entitled to the cost of valuable, permanent, and not ornamental improvements put by him on the land in excess of his proportionate part thereof.

(*c*) A tenant in common is entitled to a lien on the shares of his co-tenants in the land for taxes paid by him beyond his proportionate share, and for any sum due him for improvements or rent from his co-tenants.

(*d*) A tenant in common who has improved a portion of the land equal in area to his proportionate share on partition in kind should have the same allotted to him.

(*e*) A tenant in common who has improved a portion of the land of greater value than his proportionate share, is entitled to have the same allotted to him upon partition in kind, subject to contribution by him to his co-tenants.

(*f*) If the enquiry as to rents go behind the death of one under whom the co-tenants claim, an administrator of his estate may be made a party, unless administration be unnecessary.

FROM the chancery court of, first district, Coahoma county.

HON. CAREY C. MOODY, Chancellor.

Henry Bennett, Jr., and others, appellees, were complainants in the court below; Calvin B. Bennett, appellant, was defendant there. From a decree in favor of the complainants the defendant appealed to the supreme court. The facts are stated in the opinion of the court.

Fitzgerald, Maynard & Fitzgerald, for appellant.

The proof is clear and positive that appellant paid $43.05 of the purchase money, while his brother, Henry Bennett, only paid $15 thereof, assigning as his reason that $15 would buy all

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Brief for appellant.

the interest he wanted in the land. He knew after he returned from his seven years' residence in Missouri before then that appellant was claiming at least to own the ninety acres he had improved, and he raised no objection to it. His children bring the suit after the death of their father, knowing appellant could not testify against his estate, and hoping he would fail to prove by other witnesses the facts in the case. The house appellees are living in now was built by appellant and at his expense. But for appellant the land would have been sold for taxes and lost to the owners, for appellees' ancestor refused to pay them, saying he did not want the land. It would all now be wild land, and producing no revenue, but for the industry of appellant.

The plea of statute of limitations interposed by appellees against the claim of appellant for more than a half interest in the lands in controversy, is not good. Our contention is, we already have the legal title in our client for all the interest he has in the land, and that his interest is an undivided forty-three fifty-eighths part. While upon the face of the deed it appears that appellant and Henry Bennett owned each an undivided one-half interest in the land, yet it can always be shown by oral proof what interest in fact is owned. There is no question of resulting trust in this case, because the legal title is not in Henry Bennett to any of appellant's actual interest in the land.

The plea is not good for two other reasons: Because Henry Bennett never claimed to own more than an undivided fifteen fifty-eighths interest in the land, having said $15 would buy all the interest he wanted, and appellees are estopped from now saying he did claim a larger interest. And because Henry Bennett was absent from and residing out of the state for seven years of the period during which appellees claim the statute was running. This statute does not run during the absence of the party to be sued from the state.

The decree in this case is erroneous in ordering the commissioners to set off to appellant a half interest, instead of a

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forty-three fifty-eighths part. Besides, the decree, in compelling appellant to account for rents and profits, when he has neither received rents nor profits from third persons, nor been guilty of any ouster or exclusion of his co-tenant, involves manifest injustice, and is contrary to the weight of authority.

By the common law a co-tenant, though in possession of the whole property, whether he used it himself, and thereby received advantages and profits, or let it to his tenants, who paid him rents, was not answerable to his co-tenant for the advantages enjoyed or rents actually received. To be so answerable, there must have been some agreement expressed or implied to pay rents, or to pay for such use and occupancy. Freeman on Co-tenancy & Partition, sec. 269; *Ward* v. *Ward,* 52 Am. St. Rep., 924, and authorities cited.

The English statute, 4 and 5 Anne, ch. 16, modified the common law by creating a liability against a co-tenant "for receiving more than comes to his just share and proportion."

It has been held by a number of courts of high authority in the United States that a co-tenant in exclusive use and possession of the common property cannot be regarded as asserting any right to which he is not entitled; and where the common law still prevails, and where it has not been modified by statutory provisions of import similar to the statutes of Anne, he is not answerable to his co-tenant merely for using more than his proportion of the common property, although realizing profits from such use. *Ward* v. *Ward,* 52 Am. St. Rep., 926, and authorities cited.

Under no conditions should the court below have decreed rents against appellant which accrued prior to the death of Henry Bennett and for the year of his death. There can be no controversy about such rents belonging to the administrator of decedent. Code 1892, § 1881.

In partition of lands between tenants in common, one of whom has made improvements thereon, the equitable rule is to assign to the improver that part upon which he has made the

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Brief for appellees.

improvements, unless manifest injustice is done thereby to his fellow-tenant. As put by Chief Justice George, in delivering the opinion in *Paddock* v. *Shields,* 57 Miss., 341, "a co-tenant who has improved part of the common property is entitled to the improved part, or, if that will injure the other co-tenants, to have compensation in money."

J. W. Cutrer, for appellees.

By the terms of the deed from the state each of the parties was vested with an equal interest in the land described therein.

The appellant seeks to assert an interest in the property beyond and in addition to the calls of the deed to his brother and himself, and to show that, while the deed vests him with one-half interest in the property conveyed thereby, he holds a further interest to the extent of fourteen fifty-eighths of the interest or title vested in the ancestor of the appellees.

There was no mistake in the execution of the deed, within the meaning of equity, which could be the occasion of jurisdiction for a court of equity, superinduced by an erroneous mental condition arising out of ignorance or a misunderstanding of the truth, but without negligence. There was, if anything, a mistake of law, pure and simple, and it is more than certain that this is not adequate ground for relief. 2 Pomeroy Eq. Jur., secs. 839-842.

Courts will not enforce a resulting trust after the lapse of a considerable time, or laches on the part of the supposed *cestui que* trust. *Smith* v. *Patton,* 12 W. Va., 541; *King* v. *Purdee,* 6 Otto, 90; *Douglass* v. *Lucas,* 63 Pa. St., 11; *Hall* v. *Doran,* 13 Iowa, 368; *Midmer* v. *Midmer,* 26 N. J. Eq., 299; *Miller* v. *Blose,* 30 Gratt (Va.), 744.

To enforce the application of this rule the legislature has long since seen fit to enact statutes of limitation, which interpose a bar to the assertion of all trusts and equitable claims, except express trusts. Code 1892, § § 2731, 2763.

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Opinion of the court.

The very marrow of the appellant's case is the assertion by him of a right to hold more than the deed to him calls for. It is the assertion of a stale claim delayed of assertion until long after the death of one of the principal actors in the transaction, and after all *bona fide* witnesses thereto have passed away, or have forgotten the details thereof.

The decree directs the partition to be made as is provided by the statute. The accounting ordered is also strictly in line with the rule recognized as prevailing in Mississippi.

The commissioners appointed to make the partition are directed to make the allotments without balloting, so that the commissioners can make such allotments as in their judgment will best subserve and preserve the interests and equities of the parties.

The accounting for rents is to be had in connection with an accounting on behalf of the appellant for the improvements made by him upon the land and the taxes which he has paid. It would be inequitable, so far as the appellees are concerned, to give the appellant the benefit of all the improvements he has made and of all the taxes he has paid without at the same time charging him up as an equitable set-off with the proportion of the rents and profits of the property which he has received in excess of his portion thereof. Therefore, it is not an objection to the decree for the accounting as to rents accrued prior to the death of Henry Bennett, that the personal representative of his estate is not a party.

CALHOON, J., delivered the opinion of the court.

Henry Bennett, Jr., and his brother and sister, the appellees, who are minors, by their next friend, set up in their bill below that they are the only children and heirs of Henry Bennett, deceased, who died March 3, 1900; that he died the owner of an undivided one-half interest in a tract of 160 acres of land described, the other half belonging to C. B. Bennett, the appellant; that their deceased father and the appellant got title from

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the state in 1892, and that those two were in possession when Henry died as tenants in common, but that now C. B. Bennett is in possession of the whole tract, and denies that Henry's heirs, the appellees here, have any interest at all; that C. B. Bennett got the whole crop of 1900 and 1901, and refuses any compensation for use and occupation; that ninety acres were in cultivation during these years, for which six dollars per acre was a reasonable rental value; that partition should be made, and complainants pray for it, and for solicitor's fee, and account for the use and occupation, etc. C. B. Bennett answers, admitting the tenancy in common, but denying that the shares were equal, denying his use of any more than his proportionate share, and denying that he ever prevented decedent or his heirs from using their share. By cross-bill he charges that he and deceased bought the land from the state on May 16, 1887, for $58.05, of which he paid $43.05, and decedent only $15, thus entitling him to 118.62 acres, and the decedent to 44.38 acres; that he cleared and put all the improvements on the ninety acres at a cost of at least $10 per acre, and that he has paid all the taxes on the whole tract since the purchase, aggregating $546.33; and he prays equitable adjustment in any partition, and that the improved part be allotted to him, etc. The answer to the cross-bill denies the inequality of contribution to the purchase price to the state; denies the complainants were not excluded from the land, and says they were excluded by C. B. Bennett from the whole tract; denies that C. B. Bennett paid all the taxes; set up a half interest in all, improved and unimproved, and the ten years statute of limitations to C. B. Bennett's claim. The conveyance from the state is for the expressed consideration of $58.05, is dated May 16, 1887, and is "to Henry and C. B. Bennett." It is established, without contradiction, that Henry never paid a cent of the taxes; that C. B. Bennett paid them all from the beginning, the gross amount being $546.33; and that C. B. Bennett did all the clearing and erected all the buildings, even to the very house occupied by Henry's family. No lack of harmony appears in

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the relations between Henry and C. B. Bennett while Henry lived, and, while on the land, he lived in a house built by C. B. Bennett, and worked fifteen or twenty acres of land cleared by C. B. Bennett. There is no evidence whatever of any ouster by C. B. Bennett of Henry or complainants.

The decree which is appealed from by C. B. Bennett to settle the principles of the case adjudges that complainants own a half interest and C. B. Bennett the other half interest in the entire one hundred and sixty acres; that complainants are entitled to an account for rents, and C. B. Bennett for compensation for improvements. It adjudges that complainants are entitled to partition, so that the parties may each have an equal one-half share; and commissioners are appointed to make the partition, who are directed accordingly, and they are further directed to have regard to the situation, quantity, and advantages of each share, so that the same may be equal in value, as nearly as may be, and, if there be any inequality, they are to report it to the court. The decree then refers the papers to a special commissioner, who is directed to state an account between the parties of "the fair rental value of the aforesaid land during the occupation thereof by the said complainants, or either of them, and the said defendant, respectively, up to and including the year 1904," and to state an account of all permanent, valuable, and not ornamental improvements made by complainants or defendant, and of the taxes paid by defendant, and to "charge the said parties, respectively, with one-half of the said rental value of the said land, received by the said parties, respectively. As against the said charge for rents, the said commissioner shall credit the said parties, respectively, with one-half the value of the said improvements made thereon by the said parties, respectively, and shall credit the defendant with one-half of the amounts paid by the said defendant as taxes on said land, and said commissioner shall state the amounts, upon said basis, which shall then be found by him to be due by or from the said complainants to and from the said defendant, as the case may be." The

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Opinion of the court.

decree leaves all other matters in controversy until the coming in of the reports of the commissioners.

To recapitulate some of the facts, this record discloses very clearly the following: (1) In the year 1887 the whole tract of one hundred and sixty acres was wild land, occupied only by the beasts of the forest—just such land as it is to the interest of the state, and the society it represents, to have developed by cultivation. (2) Henry Bennett and C. B. Bennett bought this land from the state May 16, 1887. (3) The deed from the state was to those two, and therefore each took an undivided one-half on the face of the conveyance. (4) The purchase price was $58.05, of which C. B. Bennett paid $43.05 and Henry only $15. (5) From the date of the purchase C. B. Bennett has paid all the taxes, and Henry not a cent of them. So far from paying any of them, he persistently refused to pay a stiver. (6) C. B. Bennett vigorously and laboriously attacked the virgin wilderness, and cleared up about ninety acres of it, put the plow in it, and built five or six houses on it. (7) Henry wasted no muscular force on these lines, but did, off and on, come and live there, in a house that C. B. Bennett built, and worked fifteen or twenty acres of the land C. B. Bennett had cleared. (8) Henry, while he lived, and C. B. Bennett were entirely harmonious, so far as this record shows; and Henry made no complaint of C. B. Bennett's labor, nor did he ever set up any claim to its fruits. Now, when C. B. Bennett cannot testify, Henry's children, living on the land C. B. Bennett improved, complain, and want not only partition, but accounting for use and occupation. (9) While C. B. Bennett was laboring on the land, Henry was out of the state for about seven years of the time, but the house constructed by C. B. Bennett was his haven of final resort. Henry died March 3, 1900, and his children filed their bill December 9, 1901.

The majority of the court, with whom I doubtingly concur, affirm so much of the decree as dismisses the cross-bill, but we all fully agree in modifying other parts of it.

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Opinion of the court.

1. As to eighty acres being the half of the one hundred and sixty acres cleared, improved, and cultivated by C. B. Bennett, he cannot be called on to account for rents. *Medford* v. *Frazier,* 58 Miss., 241.

2. As to the excess over eighty acres, which excess he cleared, improved, and cultivated, he may be required to account for its reasonable rental value, but may offset this with the reasonable cost of the clearing and improvements put by him on that part; and if there be a balance in his favor, he shall have a lien for it on the share of the tract allotted to appellees. If the balance be in their favor, they shall have a lien for it on the share allotted to him.

3. Taxes paid by either of the parties in excess of what was due from him shall be a lien on the share allotted the other.

4. In making the partition of the land, it shall be as if it were now a wilderness, and the eighty acres to which C. B. Bennett is entitled shall be allotted him of the land he has cleared and improved; and, in the event this was more valuable than the other half in a state of nature, contribution shall be ordered. *Paddock* v. *Shields,* 57 Miss., 340; Freeman on Co-t. & Par., sec. 509; *Ward* v. *Ward,* 40 W. Va., 611 (21 S. E., 746; 29 L. R. A., 449; 52 Am. St. Rep., 911, and notes); *Allen* v. *Hall,* 50 Me., 253; *Donnor* v. *Quartermas,* 90 Ala., 164 (8 South., 715; 24 Am. St. Rep., 778); *Sneed* v. *Atherton,* 6 Dana, 276 (32 Am. Dec., 70); *Kurtz* v. *Hibner,* 55 Ill., 514 (8 Am. Rep., 665); *Louvalle* v. *Menard* (Ill.), 41 Am. Dec., 161; *Dugan* v. *City,* 70 Md., 1 (16 Atl., 501); *Collect* v. *Henderson,* 80 N. C., 337. Many other authorities might be cited—so many that this might be regarded as a cardinal principle.

5. If the inquiry as to rents goes behind the date of the death of Henry Bennett, an administrator of his estate may be made a party, unless administration is shown to be unnecessary.

Reversed and remanded for procedure according to the principles announced in this opinion.

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Statement of the case.

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JOHN C. DOUGHERTY v. YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

1. RAILROADS. *Passengers. Falling from train. Negligence.*

It is negligence for a passenger to voluntarily attempt to pass from one car to another while the train is running at a rapid rate of speed around a curve.

2. SAME. *Coercion.*

If a passenger by coercion or direction of the railroad servants attempt to pass from one car to another of a train while running at a rapid rate around a curve and fall from the train, the question of his negligence is for the jury.

FROM the circuit court of Jefferson county.

HON. JEFF TRULY, Judge.

Dougherty, appellant, was plaintiff, and the Yazoo & Mississippi Valley Railroad Company, appellee, and another were defendants in the court below. From a judgment in defendants' favor the plaintiff appealed to the supreme court.

The suit was not only against the railroad company, but was against the Pullman Company (a sleeping car company) as well. On the application of the Pullman Company the case was removed to the United States circuit court at Jackson, which decided the case against the plaintiff and in favor of both defendants. The plaintiff then appealed to the United States circuit court of appeals, fifth circuit, at New Orleans, which court reversed the judgment of the United States circuit court on the ground that the cause was not a removable one, and directed that the case be remanded to the state circuit court. See *Dougherty* v. *Yazoo & Miss. Val. R. R. Co.,* 122 Fed., 205.

When the case was returned to the circuit court of Jefferson county it was dismissed as to the Pullman Company.

The facts as disclosed by plaintiff's evidence are as follows: Plaintiff was in New Orleans, La., and desired to go to Vicks-

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Statement of the case.

burg, Miss. On February 5, 1898, he bought a railroad ticket, and took passage on defendant's train in the afternoon of that day; and, in order to avoid paying the full fare of $2 for sleeping car accommodations to Vicksburg, he and a companion purchased such accommodations to Harriston, a station between New Orleans and Vicksburg, and paid therefor $1, and proposed to then go into the day coach for the remainder of the trip. Soon after the train started, the sleeping car porter brought pillows to plaintiff and his companion, saying: "Perhaps you gentlemen would like to have a little nap." Plaintiff himself testified that some time during the night (probably about 10 o'clock) he was aroused by the porter, who said something about transferring, and at the same time informed him that they had passed Harriston; that he picked up his satchels, and they started forward (he in front, the porter next, and his companion behind); that they passed out of the sleeping car and through another sleeping car; that the train was going fast, and swaying or lurching from side to side; that this was caused by the high rate of speed of the train and running over a track which had a short curve and was rough; that when he reached the platform of the passenger car he was thrown off by a sudden movement of the train, and received the injuries complained of. The opinion of the court contains a further statement of the evidence.

The assignment of error urged the refusal of an instruction asked by plaintiff, which is as follows:

"If from the evidence the jury believe that after passing Harriston the porter of the Pullman Company, while the train was in motion, requested or directed plaintiff to go forward to a day coach, and that by reason of the curve in the track of the road at that place, and the rate of speed at which the train was then running, the swaying and lurching of the train caused thereby made the attempt on part of plaintiff dangerous, and that such danger was known or ought to have been known to said porter, and that plaintiff was thrown from said car by the

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Brief for appellant.

violent motion, swaying, or jerking of said train, caused by said rate of speed over said curve, and that the plaintiff acted with reasonable care and prudence, and as an ordinarily prudent man would have done under the circumstances—then the jury should find for the plaintiff."

Plaintiff objected to the giving of the following instructions for the defendant:

"That a passenger on a railroad train, when he passes from car to car, under ordinary circumstances, when the train is in motion, takes the ordinary risk that may attend the act; and if, in so doing, he is hurt, he must show, in order to recover, that his injury resulted from some act of negligence on the part of the defendant."

"That although the jury may believe from the evidence that the plaintiff was thrown from the platform of defendant's train by the swaying or lurching of the train, yet, if you further believe from the evidence that this swaying or lurching was not due to the defective condition of the track, nor to the dangerous rate of speed, if such has been proven, you should find for the defendant."

"That, before plaintiff can recover a verdict in this case, he must show by a preponderance of the evidence that the cause of his being thrown from the train was due to the defective or unsafe condition of the defendant's track, or from the train being run at a dangerous rate of speed."

Magruder, Bryson & Dabney, for appellant.

We lay down the proposition that not a single case has been decided which holds, as a matter of law, that it is negligence for a passenger to go from one car to another while in motion to find a seat in pursuance of the directions of the company's servants. On the other hand, in every case where it appeared the attempt was made upon the suggestion, or order, of the servant of the company, it was decided to be a question of fact for the jury. That in the very few cases which have held such

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Brief for appellant.

an attempt to be negligence, it was put upon the express ground, in each case, that it was "voluntary" and "without inducement," "direction," "occasion," or "necessity." *Leftwich* v. *St. L. R. R. Co.*, 117 Fed. Rep., 127; *Northern Pacific Railway Co.* v. *Adams*, 116 Fed. Rep., 330; *Railroad Co.* v. *Powers*, 149 U. S., 43 (Sup. Ct., 748; 37 L. ed., 642); *Bronson* v. *Oaks*, 76 Fed. Rep., 334; *B. & O. R. R. Co.* v. *Myers*, 49 Fed. Rep.; *Davis* v. *Railway Co.*, 69 Miss., 137; *McIntyre* v. *N. Y. Railway Co.*, 37 N. Y., 287; *McAfee* v. *Hindekaper*, D. C. App., 34 L. R. A., 720; *Stewart* v. *B. & P. R. Co.*, 146 Mass., 605; *Hickey* v. *R. R. Co.*, 14 Allen, 96 Mass., 429; *Dewire* v. *B. & M. R. R. Co.*, 148 Mass., 343 (2 L. R. A., 2); *L. & N. R. R. Co.* v. *Kelly*, 92 Ind., 371 (47 Am. Rep., 149); *Pool* v. *Chicago, Etc., R. W. Co.*, 56 Wis., 227; *Filer* v. *New York, Etc., R. R. Co.*, 59 N. Y., 351; *Filer* v. *New York, Etc., R. R. Co.*, 49 N. Y., 47; *Penn. R. R. Co.* v. *McCloskey*, 23 Pa. St., 526; *Lake Erie, Etc., R. W. Co.* v. *Fix*, 88 Ind., 381 (45 Am. Rep., 464); *Nave* v. *Flack*, 90 Ind., 205; *Pennsylvania Co.* v. *Hoagland*, 78 Ind., 203; *Chesapeake R. R. Co.* v. *Clowes*, 93 Va., 189; *Jamison* v. *Chesapeake & O. Ry. Co.*, 92 Va.; *Werle* v. *Long I. R. R.*, 98 N. Y., 650; *Willis* v. *Long I. R. R. Co.*, 34 N. Y., 670; *Sampson* v. *Railroad Co.*, 111 Fed. Rep., 887; *Cochet* v. *S. & T. R. Co.*, 84 Ga., 687; *Oliver* v. *L. & N. R. R.*, 43 La., 804; *Galveston R. R. Co.* v. *Morris*, 61 S. W., 709; *Sawtelle* v. *U. S. Insurance Co.*, 15 Blatchf.; *Worthington* v. *Central R. R.*, 15 L. R. A., 331; *Schenider* v. *Prov. Life Ins. Co.*, 24 Wis., 28; *Turnbull* v. *Erickson*, 97 Fed. Rep., 829; *McDaniel* v. *R. R. Co.*, 90 Ala., 67; *Bosworth* v. *Walker*, 83 Fed. Rep., 58.

The foregoing cases may be classified as follows:

1. Those which hold that it is negligence *per se* to pass from one car to another of a moving train, voluntarily, without inducement, direction, or necessity.

2. Those which hold that the passing from one car to another of a moving train is not negligence *per se*, when done for some

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Brief for appellee.

reason, inducement, or from direction, or necessity, such as going for a drink of water, to look for a seat, to find a seat when directed by a conductor, to go from a smoking car to find one's wife, to go from a dining car to a regular coach.

3. Those which have held that it is never negligence *per se* to pass from one car to another, whether with or without special reason, inducement, or direction, but always a question for the jury.

4. Every one of the foregoing cases is authority for the general proposition that the passing from one car to another of a moving train is not negligence *per se* when done upon some sufficient inducement, direction, or necessity, and in every case where contributory negligence was sought to be imputed to the passenger because of passing from one car to another in order to find a seat, the question has been submitted to a jury, and courts have held that it is not negligence *per se* and *a fortiori* if the attempt was made under the direction of the conductor or some one in authority.

The testimony shows conclusively that appellant acted under the direction of defendant's employes and servants, and the instructions given defendant were erroneous, and those refused plaintiff were correct and their refusal reversible error.

Mayes & Longstreet, and *J. M. Dickinson,* for appellee, railroad company.

There was no evidence whatever that the porter either directed or compelled the plaintiff to leave the car. On the contrary, he says he did not go unwillingly; and his whole testimony, together with that of Mr. Lea, shows that they both recognized that their contract with the Pullman Company was at an end, and voluntarily and cheerfully proceeded to go forward to the day coach. The plaintiff complains that he was not informed of the arrival of the train at Harriston, where his right to sit in the sleeper expired, but he shows that neither the conductor nor the porter agreed to rouse him at Harriston; that

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the train stopped at Harriston, and that other passengers on the sleeper, whose destination was Harriston, got off at that place. He seems to think that because of the courtesy of the porter in giving him a pillow and his remark that perhaps he would like to take a little nap, which was outside of his duty to one who contracted for a seat only, the servants of this defendant were under special obligation to arouse him when he reached Harriston, which was so far away that he might have taken a number of little naps before reaching it. The plaintiff's allegation of an agreement to awaken him at Harriston was wholly unsustained by evidence, and it will be noticed that the plaintiff was unable to testify that the porter did not call him at Harriston, when other passengers in the same car, destined for that place, along with whom he must have been called, left the train without difficulty. He says that if he was called he did not hear the porter, being asleep; but it is manifest that there was no lack of information as to the whereabouts of the train on the part of any one except Lea and himself, who had both abandoned themselves to slumber after the manner of those who pay for full sleeping car accommodation and are entitled to special attention on account of such payment, and who are, moreover, until called, shut in by the curtains of their berths, and their clothing to some extent removed. *Sevier* v. *Vicksburg R. R. Co.*, 61 Miss., 8; *Murdoch* v. *Railroad*, 77 Miss., 487.

It is a dictate of pure common sense, according with the observation and experience of every reasonable man, and it is the law, that to pass from one car to another, in the night time, and on a train which is moving at a high rate of speed, and on a section of track which is known to be rough and abounding in short curves, is negligence; and it is negligence as matter of law. *Sawtelle* v. *Insurance Co.*, 15 Blatchf., 216; *Bemis* v. *R. R. Co.*, 47 La. Ann., 1671; *McDaniel* v. *R. R. Co.*, 90 Ala., 64; *Stewart* v. *R. R. Co.*, 146 Mass., 605; *Hickey* v. *R. R. Co.*, 14 Allen, 429; *Worthington* v. *R. R. Co.*, 64 Vt., 107; *Good-*

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win v. *R. R. Co.*, 84 Me., 203; *Hicks* v. *Ry. Co.*, 14 Am. & Eng. R. Cases (N. S.), 279; *Augusta R. R. Co.* v. *Snider* (Ga.), 44 S. E., 1005; *Bronson* v. *Oaks*, 76 Fed., 734; *Aufdenberg* v. *R. R. Co.*, 132 Mo., 565; *Third Avenue Co.* v. *Barton*, 107 Fed. Rep., 215; *R. R. Co.* v. *Jones*, 95 U. S., 439.

Argued orally by *J. C. Bryson*, for appellant.

CALHOON, J., delivered the opinion of the court.

We find no evidence in this record to sustain a verdict on any contention that, at the time of the sad accident to Mr. Dougherty, the railroad tracks were defective or out of repair, or that the train was running at a dangerous rate of speed. If there was such evidence, these matters were submitted to the jury, and their verdict is controlling in this case.

Mr. Dougherty was thrown from the train in trying to pass from one car to another, in the night time, while the train was running on a three-degree curve at a rate of speed of forty-five or fifty miles an hour. The misfortune arose from the swaying or lurching of the cars produced by the rapid movement on this curve. If the act of appellant in going from one car to another, under all the circumstances, was voluntary, we think it clear that the accident was the result of his own negligence, and that the law gives him no right to recover damages. If, however, his act was on the coercion of the company's employes, or by their actual direction, the question of his negligence should have been left to the jury on all the evidence. Clearly, there was no coercion, and the only inquiry left is to see if there is such evidence of direction as would warrant the court in sustaining a verdict if returned for plaintiff below on that. We do not find any such evidence. On the contrary, from the very frank and manly testimony of Mr. Dougherty himself, the conclusion is irresistible that his action was entirely voluntary. There was no order, no command, no coercion, no discourtesy. He himself, without demur, protest, or suggestion

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Statement of the case.

of delay until the train should stop, led the way; the Pullman car negro porter being behind him with the satchels, and his friend and companion bringing up the rear.

Affirmed.

JOSEPH A. FOWLKES *v.* FRANCIS E. LEA.

1. DEEDS. *Acknowledgment of purchase money. Receipt. Parol evidence.*
An acknowledgment of the payment of the purchase money contained in a deed is but a receipt and may be contradicted by parol evidence.

2. SAME. *Statute of limitations. Code* 1892, § 2737. *Written promise.*
A recital of a consideration in a deed, which is proved not to have been paid, is a promise in writing by the grantee to pay it, and such promise is only barred by the statute of limitations (Code 1892, § 2737), applicable to written promises.

FROM the chancery court of Monroe county.

HON. HENRY L. MULDROW, Chancellor.

Fowlkes, appellant, was complainant, and Lea, appellee, defendant in the court below. From a decree in defendant's favor the complainant appealed to the supreme court.

On the 12th day of December, 1896, appellant, Joseph A. Fowlkes, executed the following deed to his son, Lee A. Fowlkes, conveying about one hundred and forty-eight acres of land described in the deed—to wit: "This indenture made on the 12th day of December, 1896, by and between J. A. Fowlkes, of Monroe county, state of Mississippi, party of the first part, and Lee A. Fowlkes, of the county of Monroe, state of Mississippi, party of the second part: Witnesseth, that said party of the first part, in consideration of the sum of four hundred dollars to ——— paid by the said party of the second part, the receipt of which is hereby acknowledged, does by these presents grant, bar-

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Brief for appellant.

gain, and sell and confirm unto the said party of the second part and his heirs and assigns, the following described lots, tracts, or parcels of land, being and situate in the county of Monroe and state of Mississippi—to wit: [Here describing the land.]" Lee A. Fowlkes married, and afterwards died, and his widow married appellee, Francis E. Lea, and died, leaving him her sole heir. On November 1, 1901, appellant Joseph A. Fowlkes, filed the bill in this case to enforce a vendor's lien on the lands described in the deed to Lee A. Fowlkes, alleging that there was still due four hundred dollars and interest from the date the sale was made. The bill further alleged that "while said deed is ambiguous as to whether the said purchase money was paid or not, in its recitals, complainant avers no part thereof has been, in fact, paid." The defendant, Lea, answered the bill, denying that the purchase money had not been paid, and stated that it had been paid in full. He set up the three-years statute of limitations in bar of the claim. On these pleadings considerable testimony was taken on the issue as to whether the purchase money had been paid. The court below, in its final decree, found that the land had been conveyed by appellant to Lee A. Fowlkes for four hundred dollars, and that no part of the purchase money had been paid, but held that the vendor's lien was barred by the three-years statute of limitations, and dismissed the bill.

Gilleylen & Leftwich, for appellant.

The recital of payment in the deed does not destroy the vendor's lien, but the recital is *prima facie* evidence of payment which the vendor must explain or disprove in enforcing the lien. *Gordon* v. *Manning,* 44 Miss., 757; *Kelly* v. *Karsmer,* 2 So. Rep., 164; Devlin on Deeds, sec. 1251.

The explanation of the recital in the deed has been furnished by the vendor. The recital of payment in the face of the deed is a mere receipt, and, like all receipts, evidence can be introduced to contradict it. Devlin on Deeds, sec. 1251. The recital of consideration may always be varied by parol. *Meyer* v.

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Casey, 57 Miss., 615; *Pollen* v. *James,* 45 Miss., 129; *Cocke* v. *Blackbourn,* 57 Miss., 689; *Hiller* v. *Jones,* 66 Miss., 636; *Miles* v. *Miles,* 78 Miss., 904.

As between the vendor and purchaser or his heir or grantees with notice when there is no independent security taken by the vendor the *onus* is on the purchaser to prove a waiver of the vendor's lien. *Crompton* v. *Prince,* 3 So. Rep., 519; *Owen* v. *Boukhead,* 76 Ala., 143.

A contract unilateral is made bilateral by the non-signing party's acceptance under it. *Marqueze* v. *Caldwell,* 48 Miss., 23; *Peevey* v. *Haughton,* 72 Miss., 918.

If the argument made is good, no matter how full and accurate the recital is on the face of the deed, the vendee could never be made to pay unless he signed a collateral undertaking. The vendee rarely signs anything. He accepts the deed and the land. By this acceptance he binds himself effectually to perform all the conditions of the deed, either express or implied, which are provable by a writing. *Washington* v. *Soria,* 73 Miss., 665; *Cock* v. *Abernathy,* 77 Miss., 872.

The learned chancellor seemed to think that § 2739, Code 1892, applied instead of sec. 2737 as decided in *Washington* v. *Soria, supra.* The court took too narrow a view. He seemed to think also that this case was distinguished from *Washington* v. *Soria* by the fact in that case that there was a reservation of a lien to secure the deferred payments which were named in the face of the deed. As we have already shown, the express reservation of a lien is not necessary, the law does that. The only other question is, Must the fact that the consideration of four hundred dollars was unpaid have been recited expressly in the face of the deed to set in motion the six-year statute? The contract of the sale of the land in all its essential features is written. By accepting the deed, putting it of record, and entering into possession of the land, Lee A. Fowlkes became a party to the contract, rendered it mutual, and is bound by all its expressed and implied terms.

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Brief for appellee.

The argument adopted by the lower court here is tantamount to that overruled in *Roberts* v. *Griswold,* 35 Vt., 496, in the language quoted in *Peevey* v. *Haughton,* 72 Miss., 925:

"But it is claimed, again, that the consideration should appear in writing, in order to give validity to the guaranty. This must either mean that the acceptance of the defendant's proposition must be in writing or a correlative undertaking on the part of the plaintiff to render future services must be in writing. We can readily understand that this might be required in some cases, as when the guaranty itself did not embody substantially the material and effective terms of the contract, and where resort to parol evidence should be necessary to show what the contract was in its terms and effect; but we do not understand that this has ever been required where all there is to be done by the other party is merely to accept the proposition in the terms in which it is made, and to perform the consideration, either by paying or doing the thing proposed."

George C. Paine, for appellee.

The court will observe from all the testimony in the case that there is not a scintilla of evidence to the effect that there was a note or any other written memoranda of any promise by the appellee to pay for the land. The question, then, is, Was the promise barred when the bill was filed? and, if so, then the decree of the chancellor is correct, and the case ought to be affirmed. The deed was made December 12th, 1896. The bill was not filed until November 1st, 1901. Under the law as announced in *Trotter* v. *Erwin,* 27 Miss., 772; *Littlejohn* v. *Gordon,* 32 Miss., 235; *Avent* v. *McCorkle,* 45 Miss., 221; *Proctor* v. *Hart,* 72 Miss., 290, the vendor's lien is barred.

The cases of *Washington* v. *Soria,* 73 Miss., 665, and *Cock* v. *Abernathy,* 77 Miss., 872, relied upon by counsel in the lower court are not antagonistic to the right of the appellee in the contention that the three-years statute defeats any right the appellant may have. In *Washington* v. *Soria, supra,* there

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were three notes evidencing the deferred payments as well as a recital in the deed reserving a lien upon the land. In the case of *Cock* v. *Abernathy, supra,* there were the writings of the power of attorney and the receipt, both of which evidence the fact that the land was sold on credit and had not been paid for. In the case at bar there is absolutely no writing of any kind. The only evidence that the land had not been paid for is the unsatisfactory testimony of the witnesses for the appellant, stating that Lee Fowlkes had said he had not paid for the land.

The only way a vendor's lien could possibly have arisen in this case under the testimony for the appellant is by and through the oral promise or declaration of Lee Fowlkes; it was created by or arose on account of the contract of sale. The vendor's lien is but an incident of the debt. What, then, was the debt in the case at bar, and the evidence of its existence? The only answer is, The debt was the four hundred dollars purchase money, and the evidence of its existence is the oral promise by Lee Fowlkes to pay it. This lien being created by the law can and must coexist with the debt and cannot survive it. *Trotter* v. *Erwin,* 27 Miss., 772.

Here the debt being based alone on the oral promise of Lee A. Fowlkes the lien, which is but an incident of the debt, is barred when the debt is barred.

WHITFIELD, C. J., delivered the opinion of the court.

It seems immaterial whether the word "be" or the word "him" be the proper word to be supplied in the blank space of this deed. The deed, at all events, contains an acknowledgment of the receipt of the four hundred dollars; and, whether "be" or "him" be supplied, it would still contain such acknowledgment of payment. But this acknowledgment of payment is, in effect, merely a receipt, and may be contradicted by parol. It was contradicted by parol in this case. The chancellor found as a fact, and we concur in that finding, that nothing had been paid, and the deed may therefore be read as if the recital were as

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follows on this point: "Witnesseth, that the said party of the first part, in consideration of the sum of four hundred dollars, does by these presents grant, bargain and sell, convey," etc., "unto the said party of the second part," etc. Now, this recital plainly states that the land had been sold to the grantee for the consideration of four hundred dollars. The question for solution in this case is, Is this recital a sufficient statement of the terms of the grant to make applicable the statute of limitations relating to written promises? The grantee accepted this deed, went into possession under it, and enjoyed the fruits of the property under it. The general principle applicable to this kind of case is clearly stated in *Locke* v. *Homer,* 131 Mass., 102 (41 Am. Rep., 199), as follows: "The fact that the agreement of the defendant is contained, not in the bond, covenant, or indenture executed by himself, but in a deed poll made to and accepted by him, affects the mode of declaring, only, and not the extent of his liability. By the law of this commonwealth, affirmed by many decisions, the grantee, by the acceptance of the deed, becomes liable to perform, according to its terms, any promise or undertaking therein expressed to be made in his behalf; although, not having himself signed the deed, he must, while the old forms of action were retained, have been sued in assumpsit, and not in covenant. *Goodwin* v. *Gilbert,* 9 Mass., 510; *Fletcher* v. *McFarlane,* 12 Mass., 43; *Phelps* v. *Townsend,* 8 Pick., 394; *Guild* v. *Leonard,* 18 Pick., 511; *Newell* v. *Hill,* 2 Metc., 180; *Pike* v. *Brown,* 7 Cush., 133; *Braman* v. *Dowse,* 12 Cush., 227; *Jewett* v. *Draper,* 6 Allen, 434; *McCabe* v. *Swap,* 14 Allen, 188, 192; *Maine* v. *Cumston,* 98 Mass., 317; *Fenton* v. *Lord,* 128 Mass., 466; *Dickason* v. *Williams,* 129 Mass., 182, 184 (37 Am. Rep., 316); *Coolidge* v. *Smith,* 129 Mass., 554. See, also, *Rogers* v. *Eagle Fire Co.,* 9 Wend., 611, 618; *Rawson* v. *Copland,* 2 Sandf., ch. 251. Such a promise is not within the statute of frauds, because it is a promise implied by law from the acceptance of the deed, and because it is a promise to pay the promisee's own debt to another person.

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Goodwin v. *Gilbert* and *Pike* v. *Brown,* above cited; *Alger* v. *Scoville,* 1 Gray, 391; *Hubon* v. *Park,* 116 Mass., 541." To the same effect are *Schmucker* v. *Sibert,* 18 Kan., 111 (26 Am. Rep., 765); *Fort* v. *Allen,* 110 N. C., 191 (14 S. E., 685); *Trotter* v. *Hughes,* 12 N. Y., 75 (62 Am. Dec., 137); *Atlantic Dock Co.* v. *Leavitt,* 54 N. Y., 39 (13 Am. Rep., 556); *Ames* v. *Robt. Moir & Co.,* 27 Ill. App., 88. And this is the doctrine of *Washington* v. *Soria,* 73 Miss., 665 (19 South., 485; 55 Am. St. Rep., 555). In *Fort* v. *Allen, supra,* the court says: "Now, it is true that it is not every recital that binds; but, without entering into a discussion of the doctrine of recitals, abounding, as it does, in many refinements and nice distinctions, it is sufficient to say, for our present purpose, that where it is the intent of the parties to place the existence of a fact beyond question, or to make it the basis of the contract, the recital will be effectual, and neither party will be permitted to deny it."

The principle with which we are concerned is this, sharply stated: Is the recital that the grantor conveyed the land to the grantee in consideration of four hundred dollars a sufficient statement of the terms of the contract to make the statute of limitations relating to written promises the only one applicable? On this precise proposition we quote the following authorities above referred to. In the case of *Ames* v. *Moir & Co.* there was an action of assumpsit for goods delivered on an instrument containing the following recital: "Contract. Chicago, June 9, 1870. I have this day bought of Robert Moir & Co., one hundred (100) barrels highwines, 'iron bound,' at one dollar and seven cents ($1.07) per proof gallon. [Signed] Wilson Ames." After reviewing several cases, the court says: "There may be a contract in writing, although it contains no express promise to pay the consideration. Strictly speaking, there is no such express promise in Ames' contract. But when a state of facts is acknowledged in writing to exist, which imports an obligation to pay, the law implies the obligation, but the contract is not thereby reduced to parol. *Ashley* v. *Vischer,* 24 Cal., 322 (85

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Am. Dec., 65). Such a contract is found in the passbook of a depositor in a bank. The entries in the book are not express promises to pay, but the law implies such promises, and the liability thereunder has been held not to be barred in five years. *Jassoy* v. *Horn,* 64 Ill., 379." It is clear here that there was no express promise on Ames' part to pay, but a state of facts was acknowledged in writing to exist, which imported the obligation; but, although the law implied the obligation, the contract was held to be a contract in writing with respect to the statute of limitations applicable. This case covers our case perfectly. There is no express promise on the part of the grantee to pay four hundred dollars, but there is a statement of facts—to wit, that the land was sold for the consideration of four hundred dollars—which statement of facts is acknowledged in writing, and from which statement of facts the law imports the obligation to pay. In such case—the contract terms being thus acknowledged in writing—the statute of limitations applicable to a written promise applies. As stated by Cooper, C. J., in *Washington* v. *Soria, supra*: "In either event the promise of the defendant, whether it be express or implied, is to perform a contract, the terms of which are written, and not unwritten. The promise to pay is implied by law, but it is a promise to perform a written, and not an unwritten, contract." We do not see how words could more clearly express the principle on which we rest our views of this case. The terms of the contract which is to be performed are in writing, acknowledged by the grantee by his acceptance of the deed and in going into possession thereunder. The promise to pay the four hundred dollars is implied by law, but it is the promise to perform the written contract—to wit, that he should pay four hundred dollars for the land conveyed. It is true that in the *Washington* v. *Soria* case, *supru,* the deed recited that the grantee was to pay in installments, but there is no difference, in effect, between the recitation in a deed poll that the grantee will pay a certain sum in installments, he making no written notes to pay, but entering into possession under the deed,

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and the recital that the grantor in a deed poll has sold and conveyed to the grantee a tract of land for four hundred dollars. There is no written note in either case, but the terms of the contract in one, just as clearly as in the other, import an obligation to pay, and import it in writing. The recital in this deed that the grantor has sold and conveyed this tract of land to the grantee for four hundred dollars is, in substance and effect, the perfect equivalent of a recital that the grantor had sold and conveyed the grantee this tract of land, for which the grantee was to pay the grantor four hundred dollars. In either case the obligation to pay is in writing, and § 2737, Code 1892, applies. The same principle exactly is involved in those cases in which the consideration for a conveyance is an assumption of a mortgage debt. Of that sort of case the court says in *Atlantic Dock Co.* v. *Leavitt, supra*: "In *Belmont* v. *Coman,* 22 N. Y., 438 (78 Am. Dec., 213), Judge Comstock says: 'It needs no authority to prove that if, in the conveyance, there are words importing that the grantee will pay the debt, he is deemed to have entered into an express undertaking to do so, although he does not sign or seal the instrument. The acceptance of a deed containing such language is evidence of the most satisfactory kind that he has promised to do what the deed says he is to do.' " In *Trotter* v. *Hughes, supra,* the recital was this: "And in consideration thereof, John A. Hughes agrees to buy the brick house and two lots of ground, corner of Division and Sycamore streets, for fourteen hundred dollars, the mortgage on it. Afterwards a deed was executed in pursuance of the agreement, from which this recital is quoted, by Trotter, the other party to the agreement, to Hughes, which conveyed the two lots mentioned in the contract, and then recites: "Subject, nevertheless, to a certain indenture of mortgage made by Jonathan Trotter and wife, bearing date the 3rd of August, 1837, to Gertrude A. Stryker, to secure the payment of the sum of fourteen hundred dollars and interest, which mortgage forms the consideration money in this deed." It was held that this recital, "which mort-

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gage forms the consideration money in this deed," was a sufficient statement of the terms of the contract to make the statute of limitations appropriate to written promises the only one applicable. It seems to us that the recital in this deed and the recital in the one before us are practically identical. We are, therefore, of the opinion that the court below erred in holding the action barred.

Reversed and remanded.

TRULY, J., delivered the following dissenting opinion:

In order to arrive at the conclusion reached by the majority of the court, it is necessary (1) to admit parol proof to alter and change the terms and conditions of a written contract, though there is neither allegation nor proof of fraud or mistake on the part of either contracting party; (2) having overthrown the recital of payment in the written contract, to add to the promise to pay, which is implied by law to exist between vendor and vendee, a prime lien, which is not retained by the instrument, and which has been expressly relinquished by the contract between the parties; (3) having rejected the written contract mutually entered into, to insert in the writing another, and thereby avoid the statute of limitations governing actions founded on unwritten contracts. I cannot join in this system of judicial conveyancing, by which a warranty deed solemnly reciting the payment of all purchase money is converted into a conveyance which reserves to the vendor a lien for the sum stated as having been paid. *Baker* v. *Fleming* (Ariz.), 59 Pac., 101; *Ahrend* v. *Odiorne,* 118 Mass., 261 (19 Am. Rep., 449). It is probably true that when the terms of a deed, as to the purchase money, show that it is unpaid, in whole or in part, or are ambiguous and indefinite, and notes or other written evidence of nonpayment be taken, the vendor may, if not estopped by waiver or conduct, assert a lien on the land so long as it remains the property of the vendee or his privies, or of subsequent vendees with notice; but I doubt the soundness of the

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reasoning which permits the specific, definite recitals of a solemn deed to be ignored and held for naught, and another and different contract manufactured purely by parol testimony. While it is true the doctrine announced by the majority of the court on this particular point is recognized in many jurisdictions, I believe the contrary view to be supported by the sounder reasoning, and more in accord with the principles of equity and justice, and I prefer to align myself with the numerous authorities so holding. 3 Pom. Eq. Juris., secs. 1250, 1251; *Smith* v. *Allen* (Wash.), 50 Pac., 783 (39 L. R. A., 82; 63 Am. St. Rep., 864). I concede that under certain circumstances a receipt can be disproved and overthrown, but, this accomplished, the creditor has nothing more than the right to proceed against his debtor, and secure a personal judgment for the sum due. The opinion of the court states: "The recital in this deed that the grantor had sold and conveyed this tract of land to the grantee for four hundred dollars is, in substance and effect, the perfect equivalent of a recital that the grantor had sold and conveyed the grantee this tract of land, for which the grantee was to pay the grantor four hundred dollars." If this statement be good law, it is useless and idle to take a deed reciting that the purchase money has been paid. How a recital that a deed is in consideration of four hundred dollars "to him paid by the said party of the second part, receipt whereof is hereby acknowledged," can be construed as "the perfect equivalent of a recital that the grantor had sold the grantee this tract of land, for which the grantee was to pay the grantor four hundred dollars," passes my comprehension. If this statement be sound or accurate, the acceptanee of a receipt for money paid for property is "the perfect equivalent" of a written promise to pay the purchase money. A novel proposition, surely.

Again, assuming that an indebtedness was due, and could rightfully have been asserted in the proceeding in the instant case, in my judgment, the same was barred in three years, under § 2739, Code 1892. That section recites, "Actions on any un-

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Dissenting opinion.

written contract, expressed or implied, shall be commenced in three years," etc. The theory on which this suit is sought to be upheld is that the grantee, by accepting the land, established an implied contract to pay for it, which was breached by non-payment, and a cause of action thereupon immediately accrued to the grantor. This contract can only grow out of the relation of the parties as vendor and vendee. The contract, if it exists at all, arises, not out of any writing which is simply declaratory of the existence of the relation of vendor and vendee, but by implication of law by reason of such relation. *I. C. R. R.* v. *Miller,* 32 Ill. App., 267; *Knight* v. *St. L., I. M. & S. Ry. Co.* (Ill.), 30 N. E., 544; *Pennsylvania Co.* v. *C., M. & St. P. Ry. Co.* (Ill.), 33 N. E., 416.

A contract in writing is one in which all necessary terms and conditions must be definitely and expressly stated. The final agreement of the parties must so distinctly appear as to render resort to parol testimony, or to the duties implied by law from the relation of the parties, or from the facts stated, unnecessary, in order to ascertain and determine the scope and extent of the understanding between the parties. The promise to pay, the amount to be paid, the date of payment, must all be set out in and by the instrument itself. This, in my judgment, is elementary. The writing here under consideration contains no expressed promise to pay, no statement of any sum remaining unpaid, and, perforce, no date of payment. These requisites of a formal, valid written contract are supplied by parol and supported by an implication of law. "If it be true that the agreement as set forth in the writing is so indefinite as to necessitate resort to parol testimony to make it complete, the law is that, in applying the statute of limitations, it must be treated as an oral contract." *Plumb* v. *Campbell* (Ill.), 18 N. E., 790. Assuming that such a thing can exist as an "implied written contract," it cannot be successfully contended that a writing which positively states that nothing is due can be distorted into a promise to pay a sum which it asserts has already been paid.

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Therefore, I contend that, if the grantee was liable at all, it was upon an "implied unwritten contract," and the chancellor was correct in so holding. *Love* v. *Atkinson* (N. C.), 42 S. E., 966.

The views herein expressed are not antagonistic to the conclusion of the court in *Washington* v. *Soria,* 73 Miss., 665 (19 South., 485; 55 Am. St. Rep., 555), where the amount due, the date of payment, and all other necessary terms of a written contract, were evidenced by the terms of the deed under review, but I disapprove of any extension of the principle announced therein. The other cases cited in the opinion in chief proceed mainly upon the principle, sound and universally recognized, that the vendee's acceptance of the deed is such an assent to all its stipulations as will estop him from making a denial. That principle has no application to the case at bar. This is an effort, not to enforce the stipulations of the deed, but to insert other and different provisions. In my judgment, the conclusion of the court practically nullifies and defeats the object of our laws requiring all contracts in reference to land to be in writing, acknowledged, and recorded. It opens the way to successful fraud, by permitting the vendee of land, holding under an absolute warranty deed, to trade on the strength of that record title, and then, if his land is taken by his creditors under execution, allow him and his vendor, by parol testimony, to establish a lien paramount to the title thus acquired by the purchaser at such sale. It renders insecure the title by which many homes in the state are held, by affording an opportunity, which was taken advantage of in the instant case, after the death of the grantee, for the prospective heirs of the grantor and others directly interested to prove by parol testimony a verbal lien in direct contradiction of the terms of the deed. Nor will lapse of time avail to perfect such title, for, if both debt and lien can be established by parol, manifestly the date of the maturity of the debt—the time when the "cause of action shall have first accrued"—can be likewise so established. Instances might readi-

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Statement of the case.

ly be multiplied, but I content myself by merely suggesting some of the perils and pitfalls which beset the path which the court is now traveling.

I disagree with the conclusion of the court, and dissent from the reasoning upon which the decision is based.

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BRITISH AND AMERICAN MORTGAGE CO. *v.* BENJAMIN L. TODD.

1. VENDOR AND VENDEE. *Warranty of title. Breach. Damages. Interest.*

Interest on the purchase maney paid for land is not recoverable as damages for breach of warranty of title when the evicted grantee has been acquitted of all liability to the owner of the land for mesne profits without paying the same; and in such case the proportion between the amount of the interest and the value of the mesne profits is wholly immaterial.

2. SAME. *Mesne profits. Improvements and taxes. Proportion.*

The measure of damages recoverable for breach of warranty of title is not affected by the proportion that exists between the value of the mesne profits received by the evicted grantee and his outlay for improvements and taxes.

3. SAME. *Surplus. Set-off. Purchase money.*

The surplus of mesne profits received by an evicted grantee in excess of his outlay for improvements and taxes cannot in an action for breach of warranty of title be set off against the purchase money of the land on the ground that the same has been credited upon a mortgage debt due to the warrantor, in an equity suit wherein the mortgagor has procured the cancellation of the warrantor's purchase of the land under an invalid foreclosure of the mortgage.

FROM the circuit court of, first district, Hinds county.

T. A. MCWILLIE, Special Judge.

Todd, appellee, was plaintiff, and the Mortgage Co., appellant, defendant in the court below.

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Statement of the case.

The action was one to recover damages for breach of warranty of title, and was tried by agreement before a special judge without the intervention of a jury upon an agreed statement of facts and certain portions of the record of an equity suit mentioned therein and also in the briefs of counsel and the opinion of the special judge. The agreed statement of facts is as follows:

"We, the undersigned attorneys for the plaintiff and the defendant in the above-stated cause, do hereby agree that the following are the facts in said cause:

On February 28, 1890, the British & American Mortgage Company, Limited (hereinafter called "the company"), loaned to Bourbon Shotwell the sum of $700, and in order to secure the payemnt of the same Bourbon Shotwell and his wife, Lida Shotwell, executed their deed of trust upon the following described lands in the first district of Hinds county, Mississippi —to wit: 23 acres in the north end of the N. W. 1-4 of the S. W. 1-4 and 30 acres in the north end of the S. W. 1-4, section 7, township 6, range 2, east; the east 1-2 of the N. E. 1-4, section 13; 101 acres in the south end of S. E. 1-4, and 27 acres on the east side of the E. 1-2 of the S. W. 1-4, section 12, and all in township 6, range 1, east, containing in all 261 acres, more or less; said lands were conveyed to A. R. Shattuck, trustee; the said Bourbon Shotwell made default in the payment of said indebtedness, and the said Shattuck, trustee, refused to execute the trust, and said company appointed one C. M. Williamson, as substituted trustee, on January 25, 1894, by virtue of the provisions of said deed in trust, who sold the above described lands, when and where the said company became the purchaser of said lands at said trustee's sale. On November 27, 1895, the company sold and conveyed by deed of general warranty the above described lands to B. L. Todd, the plaintiff in this suit, for the consideration of $1,000 cash in hand paid. The said B. L. Todd, immediately upon the execution of said conveyance,

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Statement of the case.

went into possession of said lands and continued in possession thereof until evicted as hereinafter named.

In December, 1900, Bourbon Shotwell and his wife, Lida Shotwell, filed in the chancery court, first district, Hinds county, of said state, their original bill of complaint, wherein they made as defendants the mortgage company, C. M. Williamson, and B. L. Todd; it was alleged in said bill, among other things, that the sale made by the substituted trustee was illegal and voidable, and prayed that the deed from the substituted trustee to the company and the deed from the company to Todd be cancelled and set aside, and that the defendants in said cause be required to account for reasonable rents and profits for the use of the lands for the time they had been in possession thereof. The defendants in said chancery cause answered the allegations of said bill, and proof was taken, and afterwards the chancellor of said court held that the complainant was entitled to relief. And on the 17th day of May, 1903, a decree was entered in said cause sustaining said bill and referred the matter of accounting to Oliver Clifton as commissioner, whose duty it was to take and state an account, etc. A copy of said decree is hereunto annexed and made a part of this agreement; the said commissioner, Oliver Clifton, after taking proof, made his report to said court, which confirmed said report on July 25, 1903; a copy of said decree confirming said report is hereto annexed and made a part of this agreement.

In said chancery proceedings of *Bourbon Shotwell et al.* v. *Said Company et al.,* Reuben Shotwell and others also filed their original and amended bills of complaint, wherein the said Reuben Shotwell and Mary C. Shotwell claimed to be the owners of an undivided one-fourth interest in said lands, and the said chancery court held that the said Reuben Shotwell was the owner of an undivided one-fourth interest in said land; and on the 17th day of May, 1903, the said chancery court entered its final decree in said suit of *Reuben Shotwell et al.* v. *B. L. Todd*

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et al.; a copy of said decree is hereunto annexed and made a part hereof.

In November, 1903, said company wrote and offered to pay the said B. L. Todd in full payment and satisfaction of its liability to said Todd on its covenants of warranty in said conveyance made on the 27th day of November, 1894, the sum of $906.40, which sum the said B. L. Todd refused to accept, and on the 9th day of December, 1903, the said B. L. Todd sued out an attachment against the estate of the said company in this court, and made the same returnable to the January term, 1904, of said court, and had summoned as garnishees the following named persons, who are residents of said first district of Hinds county—to wit: Jeff Gordon and Jane Gordon, Mrs. E. C. Wiggins and Blake B. Wiggins, and James H. Tripp. The said garnishees are indebted unto the said company in the following amounts: The said Gordons in the sum of $540, due as follows: November 1, 1904, $60.00; November 1, 1905, $60.00; November 1, 1906, $60.00; November 1, 1907, $360.00; all drawing interest at the rate of eight per cent per annum after maturity. Mrs. E. C. Wiggins and Blake B. Wiggins, $1,080, due as follows: November 1, 1904, $200.00; November 1, 1905, $200.00; November 1, 1906, $200.00; November 1, 1907, $1,200.00. J. H. Tripp, in the sum of $720.00, due as follows: November 1, 1904, $240.00; November 1, 1905, $240.00; November 1, 1906, $240.00; all of said indebtedness drawing interest at the rate of eight per cent per annum after maturity. The British & American Mortgage Company, Limited, is a foreign corporation. Before the bringing of this suit the said British & American Mortgage Company, Limited, made out an account, forwarded it by mail to counsel for plaintiff in this suit, which account is hereunto annexed; said account shows that there was due Todd, the plaintiff, $906.40; the company thereupon offered and were ready and willing to pay the said sum of $906.40 to the plaintiff in full settlement and satisfaction of his demands, which sum so offered was refused by said Todd upon

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the ground that the sum so offered was too small. Said company has always been ready and willing to pay the same, and tenders the same with its plea in this behalf, and now brings the same into court.

It is further agreed that either the plaintiff or the defendant may introduce in evidence all or any part of the record in the chancery suit of *Bourbon Shotwell et al.* and of *Reuben Shotwell et al.* v. *B. L. Todd et al.*

Todd made improvements, paid taxes, and collected rents, as shown by commissioner's report in the chancery suit. He paid no taxes and collected no rents for 1903, and paid no rents for 1903, place being in possession of tenants, who paid rents to Shotwell.

It is further agreed that a reasonable attorney's fee for defendant in this suit is to be fixed by the judge of the court.

Neither of the parties to said chancery suit appealed.

The said Bourbon Shotwell, in October, 1903, paid to the British & American Mortgage Company the sum of $852.93, as prescribed in said decree, and the said B. L. Todd, in October, 1903, paid to Reuben Shotwell the sum of $186.09, as prescribed in said decree. In October, 1903, the said B. L. Todd surrendered possession of said land to the said Bourbon Shotwell and Reuben Shotwell, under a writ of possession.

Witness our signatures in duplicate, this January, 1904.

ALEXANDER & ALEXANDER, *Attorneys for Plaintiff.*
WM. C. MCLEAN, *Attorney for Defendant.*

BOURBON SHOTWELL ET AL., No. 1919. v. B. L. TODD ET AL. } FINAL DECREE.

This cause came on this day to be heard on the bill, answer, cross-bill and answers, and other pleadings filed herein, and the proof taken herein, and the same having been duly argued by

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counsel and fully considered by the court, and the court having duly advised in the premises, doth find, that the appointment of the substituted trustee is void and the complainants are entitled to the relief sought in their original bill. It is, therefore, ordered, adjudged, and decreed by the court that the sale of the premises described as:

Twenty-three (23) acres in south end of northeast quarter of southwest quarter, and thirty (30) acres in north end of southwest quarter of section seven (7), township six (6), range two (2) east; the east half of the northeast quarter of section thirteen (13); one hundred and one (101) acres in south end of southeast quarter, and twenty-seven (27) acres on east side of east half of southwest quarter of section twelve (12), all in township six (6), range one (1), east, containing in all two hundred and sixty-one (261) acres, more or less, in Hinds county, Mississippi, purporting to have been made by C. M. Williamson, substituted trustee, under and by virtue of the deed of trust set out in the pleadings and proof herein, be, and is hereby, declared null, void, and of no effect, and the conveyance to said premises made and executed in pursuance thereof by said C. M. Williamson, as substituted trustee, to the British & American Mortgage Company, Limited, be, and the same is hereby, cancelled and held for naught as a cloud upon complainant's title; and it further appearing that the conveyance of said premises by the British & American Mortgage Company, Limited, to defendant, B. L. Todd, is null, void, and of no effect, it is hereby adjudged and decreed that the same be cancelled and held for naught as a cloud upon complainant's title. It is further ordered, adjudged, and decreed by the court that the said defendants, B. L. Todd and the British & American Mortgage Company, Limited, be, and they are hereby, declared to be and shall be treated as mortgagees of the premises in possession, and complainants are held to be due and liable to the defendants in and for the amount of the principal and interest of the

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debt remaining due and owing said defendants under and by virtue of the said mortgage executed to secure the same, and it is hereby ordered, adjudged, and decreed that said indebtedness be and is a subsisting lien on said premises.

It is further ordered, adjudged, and decreed that this cause be, and it is hereby, referred to Oliver Clifton as commissioner, to take and state an account of what is due the said defendants for principal and interest on said indebtedness set out in the cross-bill of complainant of said defendants herein; also to take and state an account of the rents and profits of and from the said mortgaged premises, showing from what part of said premises the rents were derived which have come into the hands of the said defendants or of any other person for their use, or which they might have received but for their negligence or willful default; also to take and state an account of the reasonable rental value of the property in question for the time the same has been in the possession of the said defendants, up to and including the time of this hearing; also to take and state an account of the value of such improvements as have been placed on said premises by said defendants, and the part of said premises on which said improvements were made, showing the time said improvements were made and whether such improvements were permanent, valuable, necessary, and not ornamental; and also the amount of taxes paid by defendants on said premises.

It is further ordered, adjudged, and decreed that said commissioner be, and is hereby, authorized and directed to subpoena witnesses and take testimony in and about said matter, and after he shall have fully considered the same and stated said account, he shall promptly return the same to this court for its consideration.

It is further ordered, adjudged, and decreed that a writ of possession shall issue to put said complainant, Bourbon Shotwell, into possession of said premises as soon as he shall pay or tender to said defendants whatever sum this court, after the

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Statement of the case.

coming in of said commissioner's report, shall finally adjudge to be due and owing said defendants, or either of them, and secured by said deed of trust.

Ordered, adjudged, and decreed, this the 17th day of May, 1902. H. C. CONN, *Chancellor.*

Decree confirming report of Oliver Clifton.

BOURBON SHOTWELL
No. 1919. v.
B. L. TODD ET AL.

This cause came on for hearing in vacation on this the 25th day of July, 1903, the same having been at last term of court submitted by consent of both parties for hearing in vacation upon the report of Oliver Clifton, commissioner appointed to compute and state to the court an account of the debt due by complainants to the defendant, the British and American Mortgage Company, Limited, and of the rents, issues, and profits of the plantation in controversy, and of the taxes paid and improvements made by the defendants, and upon the exceptions by the complainants and defendants to said report of the commissioner; and the chancellor, having heard said report and the evidence in the matter and the argument of counsel for both sides, doth now decree that the exceptions of the defendants to said report be, and the same are hereby, overruled, and that all the exceptions of complainants to said report be, and the same are, overruled in every respect except the following: The item of $11.55 interest from November 1st, 1894, to January 25, 1895, together with interest thereon at 10 per cent for the full time to May, 1903, be deducted from the amount found by the commissioner, and that the amount of $61.06 allowed for attorneys' fees, and the interest thereon for the time allowed by the commissioner at 10 per cent, be deducted from the balance due found by the commissioner, and that attorneys' fees be allowed only on the amount found to be due after said de-

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ductions, at 5 per cent of said amount; and it appearing to the chancellor after calculation and proper deduction of said interest and attorneys' fees that the true balance due by complainants to defendants is $813.27, plus 5 per cent thereon as attorney's fees—to wit, the sum of $40.66—making an aggregate of $853.93 due by complainants to defendant, the British and American Mortgage Company, Limited, it is further decreed by the court that the complainants, Bourbon Shotwell and his wife, Lida Shotwell, shall pay to the British & American Mortgage Company, Limited, the said sum of eight hundred and fifty-three and ninety-three one hundredths dollars, with 10 per cent per annum from this date till paid. Said sum is hereby affixed as a lien on the lands involved in this suit—to wit, the undivided three-fourths interest of Bourbon Shotwell in all the land described in the original bill of complaint—and unless said complainants shall pay said sum with interest within ninety days from this date, said lands shall be sold to pay the same, with costs of sale and any other costs decreed against complainants; that W. W. Downing, clerk of the court, is appointed commissioner to make said sale. Complainants shall pay all costs to be taxed on the accounting, including fees of the commissioner, and the defendants shall pay all costs in the case down to the final decree ordering the accounting. Oliver Clifton is allowed the sum of twenty-five dollars as his compensation as commissioner in this case. Upon the payment and satisfaction of this decree before sale by complainants, they shall be entitled to the possession of said property, and, if necessary, a writ of assistance may issue to put them in possession.

Decreed in vacation this July 25th, 1903.

ROBT. B. MAYES, *Chancellor.*"

The trial in the circuit court resulted in a judgment in favor of the plaintiff, Todd, for the sum of $1,000 and interest thereon at six per centum per annum from January 1, 1903, and

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Brief for appellant.

one-fourth of the interest on said sum at the same rate from November 27, 1895, until January 1, 1903.

From this judgment the plaintiff prosecuted an appeal and the defendant a cross-appeal.

W. C. McLean, for the appellant.

The three-fourths of the surplus of rents over expenditures for improvements and taxes ($558.27) was a proper set-off against Todd's demand, for the reason that the same had been credited in the equity case on the mortgage company's debt against Bourbon Shotwell, and Todd relieved to that extent, while Todd, for whose use and benefit this application of the $558.27 was made, had received and ever since retained all of the rents, amounting to $1,574; that had the mortgage company not been a party to the chancery suit, Todd's equity alone would have been considered, and under his subrogation to the company's right he would have been permitted to collect the balance of $853.93 due on the mortgage debt, and the same would necessarily have become a credit on his demand for failure of title; there is no reason in Todd's claim that under his purchase of the land he became the assignee of the company's mortgage debt, and that only on the principle of subrogation could he claim the $853.93; had Todd been sued in ejectment he would have been compelled to pay $744.35, the excess of rents over improvements and taxes, and while the purchase money and interest accrued to January, 1904, would be $1,485, or $740.64 more than the surplus of rents, and this last sum which he would have in pocket as the result of the litigation would be $165.75 less than the company had tendered to him.

Counsel argued the whole case elaborately on both the law and the facts, citing *Phipps* v. *Tarpley,* 31 Miss., 433; *White* v. *Tucker,* 52 *Ib.,* 145; *Brooks* v. *Black,* 68 *Ib.,* 161; *Bonner* v. *Lessley,* 61 *Ib.,* 397; *Dyer* v. *Britton,* 53 *Ib.,* 270.

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Opinion of the special judge.

Alexander & Alexander, for appellee and cross-appellant.

The measure of Todd's recovery was the price of the land and interest for the whole time that had elapsed since his purchase, during which he had been in possession and had been charged with rents on the accounting in equity with the true owner; it was error to say that Todd had been acquitted of liability for rent, for, while actually charged with rents, he was entitled to be subrogated to the mortgage company's right to use on the accounting the mortgage debt and accrued interest thereon, along with his outlay for improvements and taxes and accrued interest, aggregating about $2,400, which he was entitled to be paid before eviction, and against which Shotwell had the right to charge him with rents amounting to only about $1,400; the sum expended for improvements and taxes went to pay the rent claim, and to that extent Todd certainly was not acquitted of liability for rent; the company demanded and received and still held the balance of $853 remaining due on the mortgage debt, and could not demand that Todd should give it credit for a sum held by itself; Todd's improvements greatly enhanced the rents, and it was intolerable that he should be treated as having improved himself out of any of his rights against his warrantor.

Counsel discussed the whole case at length and cited *White* v. *Tucker,* 52 Miss., 145; *Brooks* v. *Black,* 68 *Ib.,* 161; Rawl on Cor., 57-75.

Argued orally by *W. C. McLean,* for appellant and cross-appellee, and *C. H. Alexander,* for appellee and cross-appellant.

The opinion of the special judge mentioned and adopted by the supreme court is as follows:

"This was an action brought by the plaintiff, Todd, against the defendant company, for damages arising out of its breach of warranty of title, the demand being for $1,000 of purchase money and interest thereon at 6 per cent per annum from the

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date of payment. The company had previously taken a deed of trust on the land from Bourbon Shotwell to secure a loan of $700 and interest thereon, which it foreclosed in 1894, and, having become the purchaser at the trustee's sale, it conveyed the land to Todd by deed of general warranty of title, and gave him possession on January 1, 1896. In 1901 Bourbon Shotwell filed his bill in equity against the company and Todd to set aside the sale by the trustee, praying an accounting as to rents and offering to pay whatever balance might be due the company on his indebtedness. Reuben Shotwell became a party to this proceeding, and established his ownership of an undivided one-fourth of the land. The trustee's sale was set aside, and on the accounting ordered it was ascertained that Todd had paid taxes and made improvements at considerable cost, and had collected rents for the years 1895 to 1902, both inclusive, amounting to a sum of money which exceeded the outlay for improvements and taxes paid by $744.36, and that the amount due by Bourbon Shotwell on his debt to the company, after deducting three-fourths of the rent surplus, was the sum of $853.93. These findings of the commissioner were carried into effect by a final decree entered in 1903, which required Bourbon Shotwell to pay to the company the sum of $853.93. This he paid, and Todd paid to Reuben Shotwell his one-fourth of the rent surplus, amounting to $186.09. The title of the Shotwells being thus established, and Todd's eviction following, he filed this suit. As stated, three-fourths of the rents received by Todd over and above his outlay for improvements and taxes were applied in reduction of the amount due by Shotwell on the debt for which the property had been sold by the trustee. No exceptions were filed to this method of stating the account, and Todd and the company being represented by the same solicitor, it would seem that the mode of stating the account must have been assented to as between them. However that may be, the operative effect of the equity proceedings is to acquit Todd of any liability to Bourbon Shotwell for three-fourths of the rent,

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and under such circumstances he cannot be heard to claim three-fourths of the interest on the purchase money for the period during which he received the rents. If, as has been often held, interest and mesne profits be the equivalents of each other, then a fraction of the one is the equivalent of a corresponding fraction of the other, and where the tenant has received an acquittance as to part of the rents, he should be denied the recovery of a corresponding part of the interest. This does not affect the principal, however, amounting to $1,000, and Todd is entitled to recover this sum, together with 6 per cent interest thereon for the year 1903, the rent of which became due after his eviction, and was never collected by him, and also one-fourth of the interest on $1,000 from the date of his purchase until 1903, since he has settled with Reuben Shotwell for one-fourth of the rent. It cannot be objected to this conclusion that the surplus of the rents received by Todd over his expenditures for improvements and taxes should be applied as a set-off against this obligation. The course taken on the equity trial was conformable to equity, and must be given its full effect. All the advantages incident to the acquisition of a valid title should have accrued to Todd as between him and the company; and if the rents exceeded his expenditures on the property, as between him and the mortgage company, he was entitled to all the benefits arising therefrom. This surplus cannot now be employed as a set-off against the principal of Todd's debt by reason of its character and the appropriation made of it by the equity court; and, furthermore, I am unable to see how a court of law, in an action for damages arising out of breach of warranty of title, can take cognizance of it. It is well settled that the proportion between rents and interest does not affect the question of liability for interest, and that when rents have been received no interest is recoverable whether they be great or small. It is only the magnitude of the rent, as compared with the expenditures, that creates the surplus; and this serves no greater office than would a much smaller sum, and can-

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not be suffered to decrease the sum recoverable as principal. In a suit by an evicted grantee for breach of his grantor's warranty of title, his right to recover is in no wise affected by the question of rents, except that where he has paid them he may recover both principal and interest, and where he has not, he can recover the principal only; and the amount of the rents, as compared with expenditures, is wholly immaterial in such case. The defendant's contention on this head derives no strength from the analogy sought to be drawn from the action of ejectment. In that case there is no privity between the real owner, who successfully asserts his title, and the party in possession; and the latter is in no position to say that, so far as the former is concerned, he is entitled to claim the rent surplus. If the position of the defendant be tenable, and the surplus rents can be employed as a set-off in this case, then it must also be true that, had the expenditures exceeded the rent, the balance in favor of the evicted tenant could be collected along with the principal and interest due on the purchase money, for both claims would have the same basis. In both cases the relations of the parties would be ignored, for in the one case the warrantor would be getting the benefit of a surplus of rents to which he was not entitled as against his warrantee, and in the other the warrantee would be getting as against the warrantor the benefit of a surplus of expenditures which he was only entitled to as against the real owner, to whom the improvements would go. If it be true, as the calculation for defendant indicates, that the defendant is now out of pocket a small sum on the whole transaction, no reason can be seen in the fact why settled principles of law should be disregarded. A reason for this loss is to be found in the fact that the defendant, as money lenders not uncommonly do, estimated the property at much less than its value as deduced from the rent it yielded, and when, in the turn taken by events, these disproportionately large rents, after years of accumulation, were credited against the Shotwell loan, they very greatly reduced it. The hardship sustained by the de-

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Syllabus.

fendant, if any, resulted from the accidents of business, rather than any deprivation of right. Let the judgment be entered in accordance with the views above expressed."

T. A. MCWILLIE, Special Judge.

TRULY, J., delivered the opinion of the court.

The opinion of the special judge in the court below is so luminous and accurate in its statement of the law, and so just in its conclusions on the peculiar facts of this case, that we adopt it as our own, and direct that it be published in full as the opinion of this court.

The judgment is affirmed on direct and cross-appeal.

JESSEE HINTON v. PERRY COUNTY.

1. COUNTIES. *Injunctions. Dissolution. Damages. Solicitor's fees.*

Solicitors' fees are allowable as damages upon the dissolution of an injunction restraining the board of supervisors of a county from removing a county seat.

2. BOARD OF SUPERVISORS. *Judgments. Collateral attack.*

Defects in the proceedings and judgments of a board of supervisors, not jurisdictional in their nature, are unavailing in a collateral proceeding to defeat the action of the board.

3. SAME. *Limited jurisdiction. What record to show.*

In matters in which the board of supervisors have limited jurisdiction its record must show jurisdictional facts, but need not set out the evidence thereof.

4. SAME. *Fraud. Corruption.*

Any judgment of the board of supervisors may be attacked on the ground of fraud or corruption when seasonably set up and pleaded.

5. LEGISLATURE. *Power. Constitutional laws.*

The legislature has all political power not denied it by the state or national constitution.

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Statement of the case.

6. CONSTITUTION 1890, SEC. 260. *Laws* 1902, *p* 172. *Seat of justice of county. Judicial district.*

Laws 1902, p. 172, providing for an election to determine the question of the removal of the seat of justice of the first judicial district of Perry county, is not violative of nor affected by Constitution 1890, sec. 260, prohibiting the change of the boundaries of county judicial districts except as therein specified.

7. SAME. *Constitution* 1890, *sec.* 259.

Constitution 1890, sec. 259, providing that no county seat shall be removed unless authorized by two-thirds of the electors voting therefor, but that where the removal is towards the center of the county it may be made if a majority of the electors voting shall vote therefor, most probably has no application to an act, like Laws 1902, p. 172, providing for an election to determine the question of removal of a seat of justice of one of the judicial districts of a county having two such districts; but, if applicable, it requires a two-thirds vote, unless the removal be towards the center of the district, in which case a majority vote is sufficient.

8. SAME. *Constitution* 1890, *secs.* 152, 259, 260. *New counties. Judicial districts. County seats.*

The subject of legislative power to create new counties, divide counties into judicial districts, and remove seats of justice of such districts discussed.

FROM the chancery court of, first district, Perry county.

HON. STONE DEAVOURS, Chancellor.

Hinton, appellant, was complainant, and Perry county, appellee, defendant in the court below. From a decree in defendant's favor the complainant appealed to the supreme court.

In February, 1902, the legislature passed an act authorizing the board of supervisors of Perry county to order an election upon the question of removal of the seat of justice from Augusta to some point on the Mobile, Jackson & Kansas City Railroad, providing that the board should make an order submitting the question to the legal voters of the county, upon a petition being filed, asking therefor, signed by two hundred qualified electors of the county. The petition having been filed, the board of supervisors, at the September meeting, 1902, ordered

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Statement of the case.

an election to be held in the county upon the question of the removal of the seat of justice. At the election Augusta and two other towns were placed on the ticket to be voted on for the seat of justice. There was a large majority of the votes cast for the removal of the courthouse, and a town called Augusta Depot received a large majority of the votes as the place to which the county seat should be removed. The election commissioners reported the result of the election to the board of supervisors; reporting that the question of removal had carried, and that Augusta Depot had received a majority of the votes cast for the new courthouse seat. Upon receiving this report the board of supervisors made an order declaring Augusta Depot to be the county seat of the first district of Perry county, and that the court should be held there as soon as the courthouse could be built, and proceeded to raise funds with which to erect there a courthouse and jail. No appeal was taken from this order. In December, 1902, Hinton, the appellant, filed the bill in this case praying for an injunction restraining the board of supervisors from removing the county seat from Augusta to Augusta Depot. A preliminary injunction was granted by the chancellor. The bill alleged that the order of the board of supervisors directing the election to be held was void on its face, because the petition on which it was based was not signed by two hundred qualified electors of Perry county; that the election commissioners, when they declared the result of the election, did not know whether the removal was toward the center of the first judicial district or not, and they could not determine whether the removal had carried until they were informed whether the removal was toward the center of the district; that the board of supervisors had no authority to adjudge that the removal was toward the center, a prerequisite to be ascertained by the election commissioners before declaring the result of the election, and the failure of the commissioners to so ascertain and adjudge before declaring the result of the election was fatal to the right of the supervisors

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Brief for appellant.

to order the removal; that the board of supervisors and the election commissioners had no power to determine whether the removal was toward the center of the district or not, because no survey of the district had been made, and there was no way provided by law to ascertain where the center of the district was, and therefore the result of the election could not be determined; that in fact the removal was not toward the center of the county, and the election did not result in favor of the removal; that the board of supervisors and the election commissioners decided that the removal was toward the center of the first judicial district, whereas, under the law, it was necessary that the removal should be toward the center of the county; that Laws 1902, p. 172, ch. 123, under which the election was held, was void and in violation of secs. 259 and 260 of the constitution of 1890. The defendant answered the bill, denying all the material allegations thereof. The answer alleged that the findings of the board of supervisors and the election commissioners were final, unless appealed from to the circuit court, and that no appeal had been taken, and the order of the board of supervisors was *res adjudicata,* and that the chancery court had no jurisdiction. The defendant made a motion to dissolve the injunction. The motion was sustained, the injunction was dissolved, and complainant taxed with the costs and attorney's fees.

Ellis & Sullivan, for appellant.

All the orders and judgments of a court of limited and special jurisdiction are void, unless the jurisdiction appears on the face of the record, and nothing is presumed in favor of such jurisdiction, but it must affirmatively appear from the record. Where is the evidence of this investigation and finding of the board to rest? It must rest in the record. The record must recite that the investigation was made and the facts which give jurisdiction, found to exist. This record does not show any investigation or finding from hearing evidence.

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Brief for appellant.

The record shows that the board obtained its information from the petition itself. The record distinctly so declares. The very language of the order shows this. 4 Am. & Eng. Ency. Law, 386; *Rhodes* v. *Davis,* 2 Ind., 53; *Johnson* v. *Eureka Co.,* 11 Nev., 28; *Rosenthal* v. *Madison P. R. Co.,* 10 Ind., 359; *Fayette Co.* v. *Chitwood,* 8 Ind., 504; *Plummer* v. *Waterville,* 32 Me., 566; *Byrd* v. *State,* 1 How. (Miss.), 163; *Root* v. *McFerrin,* 37 Miss., 17; *Bolivar Co.* v. *Coleman,* 71 Miss., 832; *Lester* v. *Miller,* 76 Miss., 309; *McCreary* v. *Rhodes,* 63 Miss., 308; *McGee* v. *Beall,* 63 Miss., 455; *Garner* v. *Webster Co.,* 79 Miss., 565; *Craft* v. *DeSoto Co.,* 79 Miss., 618; *State* v. *Morgan,* 79 Miss., 659; *Ferguson* v. *Monroe Co.,* 71 Miss., 524. The board cannot look to the petition alone, or at all, for "the necessary jurisdictional facts."

The bill raises the question that there were not two hundred qualified electors on the petitions. It may be that this question is *res adjudicata* if the record of the board is found sufficient to show the jurisdictional facts, but if it is not *res adjudicata* and we are permitted to go behind the record, then we submit that the competent evidence shows that there were not two hundred qualified electors on the petitions. Under this view the chancellor erred in overruling the exceptions of complainant to defendant's amended answer.

It was never legally and properly determined that the election had resulted in favor of removal of the county seat to Augusta Depot; the board of supervisors had no authority to order the removal, and their order for removal was illegal and void. The commissioners could not declare that the result of the election was in favor of removal to Augusta Depot until they knew from the proper evidence, and so adjudged in their finding, that Augusta Depot was nearer the center of the district (county) than Augusta, because if it was not nearer the center of the district (county) it would require two-thirds of all the qualified electors in the county, voting therefor, to carry the election.

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Brief for appellant.

Passing over the other points raised by the bill, without intending to waive anything therein alleged, we come to the allegation in the last amendment to the bill, in which it is charged that ch. 123, Laws 1902, under which the election was held, is in violation of secs. 259 and 260 of the constitution of 1890. A casual reading of this law will show that it was written for the purpose of forcing the removal of the county seat from Augusta, where it has been since the county was created. It will be noticed (1) that the law separates removal from the place or places competing for the new location, and the voter shall vote for "Removal" or "No removal," and at the same time he may designate the point to which he wishes removal. The object in this plan of separation was to induce the electors to vote for removal by inspiring the hope that the several places competing for the location would have a chance to get the prize. It did not leave the voters free to decide that the county seat should be left at the old place or removed to a designated place. In other words, it was not a choice between Augusta and Augusta Depot, for instance, but it was a choice between Augusta and as many other places as the board of supervisors might see proper to put in nomination. (2) If "removal" carries, but no place receives the votes necessary to a choice under sec. 259 of the constitution, then the board of supervisors shall order another election and give ten days notice for the purpose of determining the point of location only, and if no place receives the necessary vote, the board shall continue to order elections until some place is selected. The purpose seems to be to get the county seat cut loose from its old location, like an inflated balloon when the lines are detached, and while it is soaring in the elements with no place to alight, to force upon the people every ten days, without peace or rest, an election, until they choose an alighting place, and then the county seat, which was "removed" some time before, and which had been wandering, no one knows where, shall be drawn by some invisible power to the place selected and shall peacefully

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Brief for appellant.

settle down upon it. Under this law the county seat could be removed and never be relocated, notwithstanding an election to locate a place might be held every ten days to the end of time. But as this law contemplated forcing a removal, it is probable that the board of supervisors would continue to inflict the people with elections, until in their despair they would choose a place. In the meantime where would the courthouse be? It was removed some time ago. If the board of supervisors should continue to bombard the people with elections every ten days for two or three years before they could be made to select a place, after removal had carried, where would the county seat be while this war by election was being waged? It could not be at Augusta, because it was removed. But it may be said that removal is not effectual until the place is selected. We think this is true; and, therefore, place and removal cannot be separated so that one could carry and the other fail. The election on the place is the election and cannot be held but once in four years in any one county on account of sec. 260, Constitution 1890. This law, however, makes the election on removal without reference to place, the election, and does not treat the numerous elections that it provides for on the place, as elections at all. If this law had provided that there should be printed on the tickets "No removal" and "Removal to ————," the place or places to be named by the board of supervisors, then removal and place would have to stand or fall together, and if no place received the necessary vote, the election would be over for four years. Why then did the law not provide a scheme of this kind? Manifestly because it was not desirable to be limited to one election in four years if removal could not carry by one election. By separating "removal" from "place," and making "removal" the election, and getting "removal" carried in the first election, the voting could go on indefinitely as to place until some place won.

Was there ever a bolder attempt to evade the constitution than this? The election prohibited by the constitution oftener

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than once in four years is an election that results in leaving the county seat at the old place or that removes it to a new place. Under ch. 123, Laws 1902, the election on "removal" alone is meaningless, and the only real election under this law is the election on "no removal" and removal to place, and an election can be held as often as necessary, on giving ten days notice, until removal to a place carries. If this law should be held constitutional because "removal" and place were both selected without having to hold another election, the holding would be equivalent to saying that the election is constitutional instead of the law. Suppose, on the other hand, that "removal" carried, but no place received the necessary majority, and it took four or five elections to select the place, and these elections were all held within one year or a shorter time; would not this result, reached in this way, demonstrate the unconstitutionality of the law? If the law would be unconstitutional under this result, why is it not so for all purposes? Surely the result of the election, one way or the other, can have no effect upon the constitutionality of the law.

Ch. 123, Acts 1902, violates sec. 259, Constitution 1890, because it provides that more than one place may be submitted to be voted upon. Sec. 259, Constitution 1890, provides that "when the proposed removal shall be toward the center of the county," etc., clearly indicating that only one place for removal should be named. If this scheme of naming only one place was followed, then removal and place could not be separated, and no undue influence would be brought to bear on the voters to induce them to cut the county seat loose from its moorings and put it adrift, with the hope inspired in the breasts of the numerous groups who had pet places in nomination, that the old county seat might float around their way with the proper amount of pulling and hauling. We submit that under the constitution only one place for removal could have been provided for by the law.

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Brief for appellee.

Hartfield & McLaurin, and *N. C. Hill,* for appellee.

The order of the board of supervisors shows that there were petitions on file asking for the election, signed by more than two hundred qualified electors of the county. This fact was sufficient to give the board jurisdiction, and they need not set out in their order the evidence on which they determined that there were two hundred qualified electors who signed the petitions. *Scott* v. *Porter,* 44 Miss., 364; *Cason* v. *Cason,* 31 Miss., 587.

The orders of the board of supervisors cannot be called in question in a proceeding of this kind, a collateral attack, but can only be done by appeal. *Lemon* v. *Peyton,* 64 Miss., 161.

After a county seat election has been ordered and held, and a sufficient vote is cast in favor of some one place to work a relocation of the county seat, the question on whether the petition presented to the board or county commissioners praying that such an election be held was signed by a sufficient number of voters is not open to judicial investigation when the board has found that it was so signed. So held the supreme court of North Dakota in the case of the *State ex rel. Little* v. *Langlie,* 32 L. R. A., 723, in a case involving the question of the removal of a county seat, and which was in many respects like this case, and to which we call the special attention of the court.

The appellant claims that the board had no right or power to adjudge that the removal was toward the center of the district after the election was held. We submit that it was their duty to do so. How else could that question be determined if not by the board and the election commissioners? Appellant contends that this question could not be determined at all without a survey of the district, and says that no survey had been made. The courts take judicial notice of the United States surveys, and this district was surveyed, as all lands in this state, hence no survey was necessary in order to determine the center of the district.

The appellant contends that the county seat could not be removed toward the center of the first district of Perry county

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Opinion of the court.

by a majority vote, but that the removal must be toward the center of the county regardless of districts, to be moved by a majority vote. This contention is manifestly erroneous. It could never have been the intention of the makers of the constitution that this kind of a construction should be placed on sec. 259 of constitution of 1890, when the very next section expressly recognized the right to have two districts in a county. If the contention of appellant is correct, it would be possible, in some instances, to vote the county seat of a district out of the district entirely. This would be unreasonable. The only reasonable construction that can be placed on these two sections of our constitution, when there are two districts in a county, is to construe them to mean the center of the districts.

The result of the election shows that the vote was almost unanimous in favor of the removal, and that a large majority of the voters at the election voted for Augusta Depot, as the convenient place on the Mobile, Jackson & Kansas City Railroad to which the county seat should be removed. We submit that the evidence in this record shows that Augusta Depot is nearer the center of both the county of Perry and the center of the first district than the old town of Augusta. The act authorizing the vote on the question of removal is not unconstitutional because it authorized separate votes, on the question of removal, and then on the place to which the county seat should be removed. It provided a perfectly fair way to determine the wishes of the voters, on the question of removal and relocation of the county seat. The county seat could never be drifting about in the air like a balloon, as counsel for appellant seems to think, under the provisions of this act.

CALHOON, J., delivered the opinion of the court.

On p. 172, Laws 1902, appears an act (ch. 123) authorizing the board of supervisors of Perry county, on the petition of two hundred qualified electors of the county, to order an election to determine the question of removal of the seat of justice from

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Augusta "to some convenient point on the M., J. & K. C. Railroad;" and the act authorized a vote, at the same election, on competing points on that railroad. Accordingly the board ordered the election, and it resulted in nearly a unanimous vote for the removal, and a large majority for the point, Augusta Depot, over all the competitors combined; there being three other points contesting. The act also provides that if no point got a majority over all, and if the question of removal was determined affirmatively, another election should be ordered to determine between the two points receiving the highest number of votes, and the act also authorizes bonds to get money to pay the expenses, etc. It seems that Mr. Hinton was an earnest advocate of removal, and of the point he preferred. No appeal was taken from the action of the board of supervisors; but, after the election and the order of removal, Mr. Hinton filed his bill for, and obtained, an injunction against any further action toward removal. This injunction was dissolved, and $300 allowed as damages as attorney's fees, and he appeals.

We can see no merit whatever in his objection to the allowance of attorney's fees, and many of the grounds on which he bases his right to have the action of the board declared void are valueless, because not jurisdictional, and yet attempted to be availed of in a collateral attack. Actions of the board not involving jurisdictional power are conclusively right in this collateral litigation. Its jurisdiction being, in this matter, limited, the minutes must show that the jurisdictional facts were found to exist. This being done, there is no need ever to set forth the evidence in the judgment, and it is not controvertible, except on direct appeal.

It may be as well to say now that *Simpson County* v. *Buckley,* 81 Miss., 481 (33 South., 650), is a very different case from this. There the bill contained specific charges of fraud, collusion, and corruption, and, of course, any judgment may be attacked on these grounds seasonably set up. In the case before us now there is no pretense of fraud of any sort.

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Opinion of the court.

The legislature of the state of Mississippi has all political powers not withheld in her own constitution, or in conflict with the constitution of the United States. Sec. 3, art. 5, of the constitution of 1817 provides that "the state shall be divided into convenient districts, and each district shall contain not less than three nor more than six counties." Sec. 19 of art. 6 provides that no new county shall be created with a less area than 576 square miles. This implies power in the legislature to make new counties within the prescribed area. The constitution of 1832 contains the same provisions, and the same implication follows. Art. 4, sec. 13; art. 7, sec. 17, Neither mentions judicial districts in a county. Under these constitutions the case of *Alfred* v. *State,* 37 Miss., 296, held that the legislature could enact a valid law dividing a county into two judicial districts. It is true that *Lindsley* v. *Coahoma Co.,* 69 Miss., 815 (11 South., 336), said that that decision "is now deemed unsound," though, we assume, not on the line now under discussion; but the court followed it, because the constitutions of 1869 and 1890 had like provisions, and there had been another act, before the last-mentioned constitution, and four other acts after it, without the appearance of anything restrictive of such legislation. So we may safely assume that the decision in *Alfred* v. *State* is as binding as if it had announced correct law, and that the legislature had the unrestricted power to so divide counties into judicial districts. If it had such power then, it has such power now, and also power to change the "seat of justice" of the districts of any county, unless the power is lopped off by the constitution of 1890 under which we now live. This conclusion is irresistible, unless we overrule these decisions and the reasoning on which they are based. *Portwood* v. *Montgomery Co.,* 52 Miss., 523.

Now, Constitution 1890, sec. 152, provides that the state shall be divided into convenient court districts, as the other three constitutions did—*i. e.,* those of 1817 and 1832, and Constitution 1869, art. 6, sec. 13, did. So if there is to be any change of

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judicial conclusion, it must be because of sec. 259 or 260 of our present constitution of 1890. Sec. 260 does not apply, for the reason that there is no purpose in the act, or shown in this record, to "change the boundary of any judicial district in a county." *Lindsley* v. *Coahoma Co.*, 69 Miss., 815 (11 South., 336). Perry county has two "seats of justice," and the act under review authorized the board of supervisors to ascertain, and the board tried to see, if the voters wanted one of them changed, and this does not in any way affect the "boundary" of the district. Sec. 259 has reference only to removal of the "county seat," while here there is involved only the question of removal of the "seat of justice" of one of the judicial districts of a county. If the section embraced this, and the words "toward the center of the county" applied, it might easily happen that the two courthouses might be side by side, and this view is intolerable. We think the legislature had the power to pass the act of 1902 (*Portwood* v. *Montgomery Co.*, 52 Miss., 523), but think, if this section is pertinent at all in reference to legislative power and the vote, it must be held in the case before us to require a two-thirds vote, unless the removal is toward the center of the district, in which event the majority of those voting is enough. Here it appears by the minutes that the board found that the change was toward the center of the district, and that a majority of the votes were for the removal. In fact, largely over two-thirds of the votes were for removal, and a large majority for Augusta Depot as the point to which removal was wanted, and, in fact, this point happened to be nearer, not only the center of the district, but also nearer the center of the county.

Notwithstanding the section of the bill of rights in the constitutions of 1817 and 1832 providing for the right to "a speedy and public trial by an impartial jury of the county where the offense was committed," the court in *Alfred* v. *State*, 37 Miss., 296, sustained an act not only dividing a county into two judicial districts, for which there was no express warrant in these

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constitutions, but providing also that the jurors should be taken, not from the body of the county, but the district of the county in which district the court was to be held. As we have said, this was recalcitrantly followed in *Lindsley* v. *Coahoma Co.*, 69 Miss., 815 (11 South., 336). In *Portwood* v. *Montgomery County*, 52 Miss., 523, it was held that, without express grant, it was competent for the legislature to create new counties. So, we say, it follows that the legislature may not only create a new county, subject to the prescribed area and the other constitutional restrictions, but may also divide one into districts, subject to the constitutional provisions, and may, there being no restriction in the organic law, authorize, as here, a change of the "seat of justice" of any district of a county, where the change does not affect the boundaries of the district affected. In the case before us, it has done so in the act of 1902, on terms prescribed by that act. Those terms are set forth in the act, and those terms constitute the jurisdictional prerequisites, and the orders of the board show they were complied with, and they are conclusively true on collateral attack.

Affirmed.

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Statement of the case.

NATHANIEL C. MEANS ET AL. v. MARY E. HALEY.

TAX TITLE. *Release of state's title. Acts* 1884 *and* 1888. *Gibbs* v. *Green.*

Where land was sold in 1867 to the state for taxes and again in 1870 to the liquidating levee board, and afterwards under the decree of the chancery court of Hinds county, in *Gibbs* v. *Green*, purchased by one who procured a release of the state's title under the acts of March 4, 1884 (Laws, p. 182), and March 2, 1888 (Laws, p. 41), the validity of the title so acquired is not affected by the question whether the title was in the levee board or state, since if either had title, he acquired it; and such land is thereafter subject to sale for unpaid taxes as his property. *Paxton* v. *Valley Land Co.*, 68 Miss., 739, cited and approved.

FROM the chancery court of Leflore county.

HON. CAREY C. MOODY, Chancellor.

Mrs. Haley, the appellee, was complainant, and Means and others, appellants, defendants in the court below. From a decree in complainant's favor the defendants appealed to the supreme court.

Mrs. Haley filed her bill in the chancery court of Leflore county, against appellants and all persons having or claiming any interest in the lands described in the bill, to quiet her tax title to said land. Her bill shows the chain of title of both complainant and defendants as follows—to wit: A patent from the United States to W. H. Paxton, January 2, 1836; a tax deed from the sheriff of Sunflower county to Ike Robinson in 1861; a sale to the state for taxes in 1867; a sale to the liquidating levee board for taxes due the levee board in May, 1870; a deed from the liquidating levee board to Eugene C. Gordon in October, 1881; a deed from Eugene C. Gordon to Byron H. Evers in November, 1881; a sale to the state for taxes in March, 1883; a deed from the state of Mississippi to James D. Stewart, receiver, in March, 1885; a deed from James D.

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Brief for appellants.

Stewart, receiver, and J. M. McKee, special commissioner, to Thos. Watson, in March, 1886; a deed from Thos. Watson to the Delta & Pine Land Company in May, 1886; a quitclaim deed from Byron H. Evers to the Delta & Pine Land Company in November, 1886; a deed from the state of Mississippi, July 6, 1888, to the Delta & Pine Land Company, and sale by the tax collector of Leflore county to W. T. Rush in 1896; a quitclaim deed from the heirs of W. T. Rush to complainant, and a tax collector's deed to the complainant by the tax collector of Leflore county in 1900, the land having been sold for the taxes due for the year 1899. The bill further alleges as to complainant's title that on the 6th day of July, 1888, the state of Mississippi, under the provisions of an act approved March 2, 1888 (Laws 1888, p. 40, ch. 23), to quiet title in the Yazoo Delta, conveyed all its right, title, and interest in and to said land to the Delta & Pine Land Company, and that the Delta & Pine Land Company quitclaimed to complainant all its right, title, and interest in and to said land. The bill alleges that defendant Means claims title to part of said land under a patent issued by the state of Mississippi on January 24, 1900, and that defendant Allen claims title to the remaining portion under a patent issued to him by the state of Mississippi August 1, 1900. The bill charges that both of these patents are void; the state of Mississippi having conveyed all of its rights, title, and interest in and to the Delta & Pine Land Company in July, 1888. The defendant demurred to this bill, assigning the following cause of demurrer: In 1870 the land was not subject to sale for levee taxes and not subject to assessment for taxes. This demurrer was overruled, and defendants appealed.

S. R. Coleman, for appellants.

The sale to the levee board in 1870 was void, because the land was then held by the state under the sale of 1867, and was not subject to taxation. The act of 1888 was not applicable to the land in controversy.

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Opinion of the court.

Pollard & Hamner, for appellee.

The lands in suit were subject to taxation when they were sold in 1899, under which sale appellee claims. The Delta & Pine Land Company, as whose property they were sold, claimed under E. C. Gordon, who purchased under the decree in *Green* v. *Gibbs,* and procured a release under the act of 1888 (Laws, p. 41). The case falls squarely within *Paxton* v. *Valley Land Co.,* 68 Miss., 739.

TRULY, J., delivered the opinion of the court.

This case is controlled by the decision of this court in *Paxton* v. *Valley Land Company,* 68 Miss., 739 (10 South., 77), and we decline to disturb the rule of property which has grown out of that case. The intent of the legislature in enacting the several laws germane to this matter was to validate the title and make secure the possession of that large class of property owners in the delta of our state who hold under various sales for taxes made in years past. It certainly should not be the policy of the courts to disturb titles so quieted on account of any difference of opinion merely as to the correctness of past adjudications. In this class of cases, more than probably in any other, it is proper to observe and respect the wholesome doctrine of *stare decisis,* and follow the "broad and beaten way."

Affirmed and remanded, with sixty days to answer after filing of mandate in the court below.

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Brief for appellant.

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SCIPIO MARTIN v. ANTOINETTE MARTIN.

EXEMPT PROPERTY. *Descent and distribution. Widow's right. Partition. Rent, etc. Code* 1892, § 1551; *amended laws* 1900, *p.* 129. *Code* 1892, § 1553.

Under Code 1892, § 1551, as amended Laws, 1900, p. 129, and Code 1892, § 1553, regulating the subject, exempt property, real and personal, left by a deceased husband descends to his widow and children—grandchildren taking *per stirpes* the share of deceased children—as tenants in common; but the widow has the right to occupy and use the same, freed from liability for rent or hire and from partition during her widowhood.

FROM the chancery court of, second district, Coahoma county.

HON. CAREY C. MOODY, Chancellor.

Scipio Martin, the appellant, was complainant, and Antoinette Martin, appellee, was defendant in the court below. From a decree in defendant's favor the complainant appealed to the supreme court. The opinion states the facts of the case.

J. W. Cutrer, for appellant.

By the provisions of sec. 1551 the real and personal property of the deceased on his death descended to the appellee and the children of the decedent as tenants in common. The estate thus devolved upon them was an estate in fee, and each became entitled to the same estate and to the same consideration according to the express provisions of the statute. Neither the wife nor the children were given any advantage over the other, but all were treated with exact equality, and their rights and estates became fixed and vested upon the happening of the death of the decedent. They became tenants in common, with all the rights and subject to all the burdens and inconveniences which follow upon holding of an estate in common. At the common law there could have been only a voluntary partition of the said lands so devolved upon them, the right of partition not

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having been recognized at the common law as between co-tenants. 17 Am. & Eng. Ency. Law, 677.

Under some circumstances—in fact, under most circumstances of ownership of lands in common—partition is granted by the statute law of the state. Code of 1892, ch. 92.

If this were all the law upon the subject, the parties could at pleasure, under the circumstances of ownership disclosed by this record, have secured the partition and put an end to their co-tenancy; but as the property in question had been devolved upon these particular co-tenants by the death of the head of a household who had left a widow, the legislature has deemed it wise that the household shall not at once be broken into fragments, but that so long as the widow shall survive unmarried and desire to occupy the home, it shall not be subject to partition.

The obvious and natural view to take of the state of case presented by the record here in the light of the statutes is this: That sec. 1552 was designed only to engraft upon the chapter on partition an exception that in the particular state of case presented by this record partition of the homestead should not be had without the consent of the widow. Section 1553 cannot mean more than just that. By its terms it does not undertake to grant any estate to, or right or interest in, the lands which constitute a homestead. Its language is simply that of a negation or denial in the particular state of case presented to the tenants in common, other than the widow, of the recognized right to a partition of the homestead. No words are used which in any way diminish the equal rights of the co-tenants with the widow. There are no words used which operate to disseize the other co-tenants of any of the estate devolved upon them by law. These other co-tenants may hold, and she may hold her estate, in the homestead according to the rights fixed by the law of descent, and each must hold in recognition of, and with their respective rights subordinated to, the correlative and equal rights of the others. There is by the words of the

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statute no grant of the rents, issues, and profits of the lands to the exclusive use of the wife. The statutes, secs. 1551 and 1553, ought to be considered and construed together.

Under the statutes it must be deemed that the widow and children hold the exempt property in common in perfect equality, with no limitations upon the rights of the one or of the other to a fair and equal share of the property, and with all the rights incident to a common ownership. The only limitation upon the rights of any of the parties was and is that partition which was not a right at the common law, but a privilege granted by the statute, and was by the effect of sec. 1553 withdrawn, so that the same could not be invoked by the children, and that the operation of sec. 1553 of the code, the operation of the statutes authorizing partition of lands, were limited in their operation so as to exclude therefrom the partition of land held by a particular tenure—that is, where the widow and children of a deceased exemptionist shall hold land as tenants in common during the widowhood of the widow, unless she shall expressly consent thereto. Nothing is granted to the widow by the provisions of sec. 1553, and nothing is taken from the children—only this: It is provided that the statutes upon partition shall not apply to tenants holding property under the particular circumstances of ownership denominated by the statute.

Why should the law be otherwise? The widow has no superior claims above the claims of the children; it is as vital that they should have a right to the occupation of the homestead in common as tenants of that class with the widow as that she should have a home in common with them; but there is no consideration which can move the court to say that she should and shall have the home of the deceased ancestor in preference to the children, and that the children shall take nothing; that she may occupy exclusively the homestead, and her children, her tenants in common, be deprived of all rights in the premises. There are so many variant and conflicting interests and claims which develop or arise after the death of the head of a family

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Brief for appellee.

that the law cannot and has not sought to discriminate as between the various objects of the bounty of the decedent. There may be left a loving mother, with young and dependent children; or there may be a matured stepmother, with a brood of her own. The law has not said that one shall have special consideration over the other, but it has announced and laid down the unvarying rule that under all circumstances the widow and children shall hold in common, and that the widow shall have the veto power when it comes to a partition of the estate.

Just as the statute has provided during the life of the husband, that while the wife has no interest or estate in the homestead, she has a veto power which will prevent the husband's disposing of or encumbering it without her consent. Code 1892, § 1983.

The contention advanced and insisted upon by the appellee goes to the limit. She is entitled to the exclusive occupation of the lands and to the entire rents, issues, and profits thereof—that is to say, her tenants in common are to be deprived of any right to share in the occupation of the property, and are at the same time to be deprived of the right to share in the rents, issues, and profits thereof. They may not occupy any portion of the lands and shall not have a farthing of the income.

D. A. Scott, for appellee.

Section 1551 of the code provides that all property, real and personal, exempt by law from sale under execution or attachment, descends to the widow and children (and by amendment, Laws 1900, p. 129, grandchildren) as tenants in common. Under this statute it is not to be doubted that the widow and surviving children or grandchildren of Louis Martin became tenants in common of the tract of land above mentioned, he having died intestate, subject, however, as we insist, to the right of the appellee, Antoinette Martin, as widow of Louis Martin, to

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Opinion of the court.

the exclusive use and occupation thereof during her widowhood, as provided for in sec. 1553 of said code.

The effort, however, of the appellant is to limit her use of this property to what is practically one-fifth of the same, for if he is entitled to one-fifth of the rents, issues, and profits, then the other heirs at law of Louis Martin would likewise be entitled to a one-fifth interest therein, thus leaving to the widow the remaining one-fifth. We insist, however, that the widow is entitled to use the homestead in any way she may deem proper, and may devote it to any use which would subserve her interest and at the same time carry out the clear intention of the statute last mentioned, which manifestly intended that she might not only occupy and use a part of the homestead for her support and maintenance during her widowhood, but that she might so use the whole of the same; and the manner in which she is thus authorized to use the homestead is left to her sole discretion and judgment, and about the only way in which she could use the same would be by appropriating the rents and profits to support and maintain her, keep the property in a good state of repair, and pay all taxes legally assessed against the same.

CALHOON, J., delivered the opinion of the court.

We handed down this case, affirmed without a written opinion. Yielding to request of counsel for appellant in his suggestion of error, we will proceed to write our views.

Louis Martin died intestate in 1900, leaving as heirs his widow, over 70 years old, and four children. At the time of his death he lived on the land about which this dispute arose, it being all the land he had, and had, as his family, living on it with him, his wife and two of his children. The other two children lived elsewhere. Since he died, one of the two children who lived with him on the land also died, leaving three children. This land, with some personal property of inconsiderable value, was exempt from execution in the hands of Louis Martin, and by law descended to his widow and children,

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and the land was incumbered when he died by a mortgage to a loan company to secure his debt of about $600. Scipio Martin, one of the children not resident on the exemption, filed the bill in this cause against the widow and the three grandchildren and Rebecca Hopson, the other child not resident on the exemption, and Hettie Green, the other resident child. In this bill he prays that a receiver be appointed to take possession of the premises, rent it, pay the debts of Louis, and that then the rents, issues, and profits be decreed to him and the parties defendant according to their respective shares, and for partition similarly among the parties.

Other features are shown in this cause not necessary to be referred to in order to develop the point for decision. The question is as to the correct interpretation of Code 1892, § § 1551–1553, in reference to the rights of the widow in exempt property. We have examined the whole history of legislation in this state on the subject, the acts of 1839, 1846, 1852, 1860, 1865, and the codes, and all the decisions on each and all of them, and have reached a conclusion now to be stated, and which is dimly foreshadowed in *Middleton* v. *Claughton,* 77 Miss., 135 (24 South., 963), though it did not present the question we now have before us. However, it distinctly recognized it as a serious question.

Section 1551, Code 1892, which is the same as § 1277, Code 1880, provides that "the property, real and personal, exempted by law from sale under execution or attachment, shall, on the death of the husband or wife owning it, descend to the survivor of them and the children of the decedent, as tenants in common." The amendment in the acts of 1900, p. 129, ch. 89, simply brings in grandchildren to take *per stirpes.* Section 1553, Code 1892, is this: "Where a decedent leaves a widow to whom, with others, his exempt property, real and personal, descends, the same shall not be subject to partition or sale for partition during her widowhood, so long as it is occupied or used by the widow, unless by her consent." This sec-

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tion does not appear in the revised code of 1880 or any other code of the state.

Exemption laws are designed for the welfare of families as families. It was not the purpose to have the property so that every one of a large family of children might compel a division between them and the widow of property not averaging in the state, perhaps, $500. This would result in stripping them of all of the means of support, and even of shelter. To require an account from the widow of the fruits of her "use or occupation" would, if the right were availed of, in nearly every instance, work the same calamitous result. In either case it would be as well, so far as any beneficent effect on the helpless is concerned, to let the creditors have it. By Acts 1865, p. 137, ch. 9, the widow took it all during widowhood, as against the heirs, and on her marriage or death it descended to the children. *Birmingham* v. *Birmingham,* 53 Miss., 610. Now she takes as a child does by descent an equal share of the fee, but cannot be compelled to partite or account for the user so long as it is "occupied or used" by her. This seems a wise provision. Laws are made to work the greatest good to the greatest number. None are perfect. The object was to protect families from want, and free some property from the grasp of creditors. In a very large majority of cases it is better that the widow take the place of the husband in the maintenance of the family, and this was the design of Code 1892, § 1553, and its language effectuates that design, and the propriety of it could not well be better illustrated than by the case at bar. The widow, who is entitled to protection herself, is left as head of the family, and is, as the husband was, entitled to undisturbed use and occupation during her widowhood and ownership of her share.

Suggestion of error overruled.

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Statement of the case.

PETER M. M. ALEXANDER v. POSTEL M. ZEIGLER.

1. LANDLORD AND TENANT. *Farming on shares.*

If the owner of a farm furnishes the land, team, and farm implements and feeds the team, and another furnishes the labor to make and gather the crops, to be divided between them, the relation between them is that of landlord and tenant.

2. SAME. *Replevin.*

In such case a plaintiff, who has the right of possession against the tenant, may by an action of replevin recover the tenant's share of the crops from the landlord.

3. SAME. *Waiver of landlord's lien. Commingling goods. Estoppel.*

A landlord who has waived his lien for rent in favor of one who advances supplies to a tenant on the security of a deed of trust on his cotton crop, is, after receiving cotton to the amount of four bales from the tenant and mingling the same with his own, estopped to deny that a bale of cotton seized by the trustee was produced by the tenant on the demized premises.

4. PRACTICE. *Excluding all evidence. Rule.*

Upon a motion to exclude all the testimony, not only the facts expressly testified to, but all inferences necessarily and logically to be deduced therefrom, are to be taken as true, in favor of the party against whom such motion is interposed.

FROM the circuit court of Holmes county.

HON. A. McC. KIMBROUGH, Judge.

Alexander, the appellant, was the plaintiff, and Zeigler, the appellee, defendant in the court below. From a judgment in defendant's favor the plaintiff appealed to the supreme court. The facts were:

Zeigler was the owner of a farm, and in the year 1902 contracted with one Will Horton to make a crop on shares; Zeigler to furnish the land, team, and farm implements, and to feed the team, and Horton to furnish the labor to make and gather the crop; the crop to be equally divided between them.

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Brief for appellant.

Lewis & Herman, who were merchants, took a deed of trust on Horton's crop, and furnished him with supplies. Appellant, Alexander, was made trustee in the deed of trust. The deed of trust was given on the 17th day of January, 1902. The supplies were advanced after the middle of March following. Horton made six bales of cotton, and Zeigler took possession of four of them.

This suit was an action in replevin brought by Alexander, the trustee, to recover possession of one bale of the cotton. There was a judgment in the lower court for defendant, upon a peremptory instruction, after the evidence for plaintiff had been excluded. The evidence in the case is sufficiently stated in the opinion of the court. It is contended for appellee that the evidence failed to identify the cotton levied on as being part of the cotton raised by Will Horton. It is further contended that, if appellant acquired any rights at all to the cotton, it was under the trust deed, and that he became either assignee of a lien, as defined in § 2682, Code 1892, or the owner of a half interest in the crop raised by Horton, and consequently a tenant in common with appellee, and in either event replevin would not lie. It is also claimed that the mortgage under which appellant claims title to the cotton is void because at the time it was executed the mortgagor's share to be produced did not have such potential existence as to be a valid subject of a mortgage at law. Plaintiff's motion for a new trial was overruled.

Noel, Pepper & Elmore, for appellant.

Horton was a tenant to Zeigler and had such an interest in the leased premises as to sustain a deed of trust upon the crops to be thereafter grown, even though not planted.

Whether the relationship was that of landlord and tenant, or otherwise, the deed of trust was valid as between the parties, and as Zeigler has proven no claim in himself to the property, a valid agreement between the parties would bind him.

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Brief for appellant.

Regardless of the relationship of the parties, Zeigler having induced Lewis & Herman to make advances to Horton by his agreement to waive all claim on one-half of the crop, and having received one-half, three bales, was estopped from disputing the rights of appellant to the bale of cotton constituting a part of the other half.

A contract similar to this, where one party furnished the land, team, and farming implements, and the other the farm labor, and each was to receive one-half of the crop, was held by this court to constitute the relationship of landlord and tenant. *Schlicht* v. *Callicott,* 76 Miss., 487.

Crops to be grown by the grantor or his employes during the year, on land of which he is in possession, either as owner, or by the consent of the owner, preparatory to making a crop, have such a potential existence as to be a valid subject of mortgage. *Russell* v. *Stevens,* 70 Miss., 685; *Everman* v. *Robb,* 52 Miss., 653; *Stadeker* v. *Loeb,* 67 Miss., 200; *McCown* v. *Mayer,* 65 Miss., 537.

Whatever the relationship may be termed, as between the two, and as against all others who have not acquired, by contract, valid rights to the property, the deed of trust on the property in controversy is valid. *Sillers* v. *Lester,* 48 Miss., 513; *White* v. *Thomas,* 52 Miss., 49; *Davis* v. *Marx,* 55 Miss., 376.

Three witnesses testify, uncontradicted, that the deed of trust in evidence was given upon the assurance of appellee that he would assert no claim to the property incumbered, one-half of the crop produced by Will Horton, his share, and this is the last bale of that share.

The elementary principles of estoppel bring this case within the rules. Estoppel arises from any act or declaration, intended or calculated to mislead another, and on which that other has relied, and has so far acted, or refrained from acting, as that injury will befall him if the truth of the act or declaration be

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Brief for appellee.

denied. *Staton* v. *Bryant,* 55 Miss., 261; *Davis* v. *Bowmar,* 55 Miss., 671.

Tackett & Smith, for appellee.

If appellant acquired any rights at all under his deed of trust he became either the assignee of an employe's lien, as defined in sec. 2682 of the code, or the owner of a one-half interest in the crop raised by Horton, and consequently a tenant in common of same with appellee. In either event replevin would not lie.

An employe's lien could only be enforced in the manner provided by sec. 2684 of the code or in the chancery court.

Contracts between one in possession of land and laborers who are to receive a share of the products thereof, produced by them, are usually regarded as constituting the parties to such contracts tenants in common of the crops when same come into existence. *Doty* v. *Heth,* 52 Miss., 530.

Under Horton's contract with Zeigler he was to have one-half of the crop as compensation for his labor in producing same. He made six bales of cotton, four of which were in the possession of appellee at the time this suit was instituted. It is true that two bales had been appropriated by Horton, but no partition of the joint property had been made and the weight of the different bales was not shown.

In 24 Am. & Eng. Ency. Law (2d ed.), 493, citing numerous authorities in support thereof in note 1, it is stated that "one tenant in common of a crop, though it is divisible by weight or measure, cannot recover against his co-tenant, in replevin, for his share of the crop." And in *Holton* v. *Binns,* 40 Miss., 491, it was held that "joint owners of personal property have each an equal right to the possession of the joint property, and hence an action of replevin will not lie in favor of one joint owner against another."

The mortgage under which appellant claims title to the cotton is void, because at the time same was executed, January 17th, the mortgagor's share of the crop to be produced did not

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Opinion of the court.

have such a potential existence as to be a valid subject of mortgage at law.

TRULY, J., delivered the opinion of the court.

The peremptory instruction given for appellee (defendant below) cannot be sustained upon either ground assumed by counsel. The rule that one tenant in common cannot institute replevin against his co-tenant does not control this case. Horton was a tenant, and appellee was his landlord. This point was expressly decided, upon almost identical facts, in *Schlicht* v. *Callicott,* 76 Miss., 487 (24 South., 869). The trust deed from Horton to appellant conveyed the interest which Horton had in the crops to be produced, and, after condition broken, authorized appellant, as trustee, to obtain possession of such products. The decision in the case cited is a full and complete answer to the argument presented by counsel for appellee on the first ground.

Nor can the action of the court be sustained upon the idea that there was no proof that the particular cotton seized by the officer, and the subject of this controversy, was in fact produced by the grantor in the trust deed, who was also the tenant of the appellee: (1) Because the testimony was ample, standing undenied and unexplained, to have authorized the jury to find that the cotton was so produced. The tenant, Horton, testified that he raised the cotton in controversy on the land of the appellee; and, if this was true, appellant was entitled to the possession thereof. Upon a motion to exclude the testimony, not only the facts expressly testified to, but all inferences necessarily and logically to be deduced therefrom, are to be taken as true, in favor of the party against whom such motion is interposed. (2) In addition to the above, by the undisputed testimony of three witnesses, appellee had waived his lien as landlord on the crop to be produced by Horton, and subordinated the same to the claim for supplies to be furnished under the trust deed. It was also proved that the appellee had received four bales of cotton from his tenant, all of which, under the waiver, was subject to

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Statement of the case.

the lien of appellant's trust deed, and had mingled the same with his own cotton. Under this state of facts, he was estopped to deny that the particular bale of cotton seized was in fact one of the bales produced by the tenant on the leased premises.

Under no phase of the case as presented by this record was the action of the court in directing the verdict for appellee authorized. In the absence of all denial and contradiction, appellant was entitled to a peremptory instruction on the case made.

Reversed and remanded.

SOUTHERN RAILWAY COMPANY v. IRA F. CHEAVES.

RAILROADS. *Constitution* 1890, *sec.* 193. *Fellow-servant rule. Superior servant. Construction.*

A railroad employe, injured by the negligence of a superior officer or agent of the company having the right to direct his services, can recover therefor from the railroad company, under Constitution 1890, sec. 193, modifying the common-law fellow-servant rule, although his injuries were not received when executing some special command or order given by such officer or agent, but while engaged in the discharge of his ordinary duties, and when such officer or agent was engaged in discharging only the ordinary duties of his station.

FROM the circuit court of Lowndes county.

HON. EUGENE O. SYKES, Judge.

Cheaves, the appellee, was plaintiff, and the railway company, defendant in the court below. From a judgment in plaintiff's favor the defendant appealed to the supreme court. The case was before in the supreme court on the appeal of the plaintiff, and the decision then rendered is reported. *Cheaves* v. *Southern Railway Co.*, 82 Miss., 48 (33 So. Rep., 649; 34 So. Rep., 385).

Plaintiff was a fireman, and was injured by the collision of two trains at Columbus, Miss., caused by the negligence of the

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Brief for appellant.

engineer in charge of the engine on which plaintiff was at work, in going to sleep. The evidence showed that there was a train standing alongside the station at Columbus, on what was known as the "house track," ready to go out. An incoming freight train of thirty-five cars from the east, being pulled by the engine on which the plaintiff and the sleeping engineer were, crashed into the one standing on the switch at a rate of speed variously estimated at from fifteen to thirty miles per hour. There was a whistle board about a mile east of the Columbus depot, at which it was the duty of the incoming engineer to blow the whistle and slow up to a speed not exceeding ten miles an hour, with his train under complete control. There was a sidetrack six hundred yards east of the station, on which all freight trains from the east went. Columbus was a terminal station, and the engine, when brought in, was turned over to a hostler, and the yardmaster, with the yard engine, took charge of the train. There were five public crossings between the whistle board and the sidetrack, at all of which the whistle should have been blown and the bell rung. This was not done, and the train came in without warning of any kind. The yardmaster, who was in the eastern part of the yard, tried very hard to flag the train, but his efforts were not heeded. When this east-bound train left Steen's, the nearest station east of Columbus, eleven miles away, the engineer told the plaintiff to keep the engine red-hot; he was going in. This was the last word spoken by the engineer to the fireman. There were verdict and judgment for the plaintiff for $7,500. Defendant's motion for a new trial was overruled. The opinion of the court contains a further statement of the facts.

A. F. Fox, for appellant.

Even if the engineer is in some sense the superior officer, having the right at times to control or direct the services of the fireman, still, in the sense of the constitution, he must, in order to make the employer liable, be in the exercise of that control

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or direction of the fireman's services at the time of the injury, and that control or direction of the fireman's services must be the proximate cause, the *causa causans*, of the injury.

This court, in the case of *Farquhar* v. *Railway Company*, 78 Miss., 199, not only recognized the doctrine of fellow-servants as still existing, but approved its wisdom by declaring that "society, in its most refined and elevated conditions, requires its continuance." So there can be no prejudice against the principle in considering the relative duties and obligations of master and servant. Sec. 193 of the constitution will not in its construction be extended by implication beyond its evident and plain import. This court, in the case of *Evans* v. *Railway Company*, 70 Miss., 530, expressly deprecates enlarging this constitutional provision by interpretation, declaring the fact to be incontrovertible that the purpose of the framers of the constitution was only to modify the doctrine to a certain extent, and that extent was carefully expressed in sec. 193. In this case the court says that this constitutional provision has reference to a superior agent or officer of the sort, well known as such, and any other person in the company's service, by whatever name, who may be entrusted with the right to control and direct the services of others, according to his discretion and judgment, one to whom is committed the direction or control of others for the accomplishment of some end, dependent on his independent orders born of the occasion, sprung from him as director, and not consisting of the mere execution of routine duties in pursuance of fixed rules by various employes, each charged with different parts in the general performance. This case is fully reviewed and approved by United States court of appeals in *Fenwick* v. *Illinois, etc., R. R. Co.*, 100 Fed. Rep., 247.

The soundness of this view is apparent, and if this court is to adhere to it, it must be held that an engineer and fireman are fellow-servants. The evidence in this case discloses no authority in the engineer to direct the services of the fireman according to his discretion. The engineer had no discretion. He acted

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Brief for appellant.

under fixed and definite rules in the operation of the engine, and only had authority to direct the fireman, not according to his discretion, but according to fixed rules prescribed by a common master for the guidance of both operating together in running the engine.

It would be absurd to say that the engineer had any authority to control the fireman "for the accomplishment of some end dependent on his independent orders." The engineer can give no independent orders, and did give none in this case. On the contrary, all orders given by him to the fireman consist, in the language of Justice Campbell, "in the mere execution of routine duties in pursuance of fixed rules." In the operation of the engine the engineer simply communicates to the fireman according to these rules. It is clear under the statement of Engineer Graham Jones that the fireman was no menial employed to wait on the engineer and do his bidding, obeying his independent orders; he was employed by the same master by whom he was paid, and to whom, in consideration of his salary, he was under a responsibility fully commensurate with that of the engineer to run the engine, protect the company's property, his own life and those of his fellow-servants. His duties were in the same line as those of the engineer. He was the helper, and as such he had become, according to his own testimony, a competent engineer; in fact, it is the design of these rules to train firemen in all the duties of the engineer, so that they will in time be promoted to that position.

When he neglected to look out for signals, and allowed the train to run into Columbus in such a reckless way, he was guilty of a wanton and willful violation of the high duty he owed to his employer and to the public, and it is unthinkable that a court of justice will compel an employer to reward any employe for such outrageous, criminal conduct. *Dantzler* v. *De Bardeleben Coal & Iron Co.*, 101 Ala., 309 (22 L. R. A., 361); 2 Bailey, Personal Injuries, 749; *Haynes* v. *R. R. Co.*, 3 Cold., 222;

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Brief for appellant.

Illinois, Etc., R. R. Co. v. *Hooley,* 45 Ill. App., 205; *Mulligan* v. *R. R. Co.,* 19 Montana, 135.

Some relation of cause and effect between the right of the engineer to control the services of the fireman, and the injury sustained by the fireman, must be shown. The engineer must have been at the time of the injury in the exercise of that authority and that control of the services of the fireman, which exercise of authority and control must have been the proximate cause of the injury sustained by the fireman. We do not contend that the authorities are uniform on this question, but insist that all reason and logic and sound principle are in the support of our position and of the authorities which we shall now cite. In the case of *B. & O. R. R. Co.* v. *Baugh,* 54 Am. & Eng. R. R. Cas., 328 (149 U. S., 367), in which it is held that an engineer and fireman are fellow-servants even in the absence of the conductor, in which case, according to the rules of the company, the engineer is to be considered as conductor, the court said: "It may further be noticed that in this particular case the injury was not in consequence of the fireman's obeying any order of his superior officer. It did not result from the mere nature of control. It was through negligence on the part of the engineer in running his engine, and the injury would have been the same if the fireman had had nothing to do on the locomotive and had not been under the engineer's control."

In the case of *N., C. & St. L. R. R. Co.* v. *Wheeless,* 10 Tenn., 74 (15 Am. & Eng. R. R. Cas., 315), in which it is held that the engineer is the fellow-servant of the brakeman, the court says: "The principle upon which our rule is based—to wit, that the master will be liable for injuries resulting to one servant from the negligence of another servant who is the immediate superior of the first—is based, not upon the idea of the relative rank of the two servants or the general superiority in position, intelligence, or skill, or in the wages received, but upon the ground that the one is placed under the orders and direction of

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the other, and required to submit to and obey such orders in the performance of his duties. The plaintiff cannot in any fair sense be said to have been acting in this particular matter under the orders either expressed or implied of the engineer, and the mere fact that the engineer was the superior of the plaintiff in position, skill, intelligence, and pay does not change the result."

In the case of the *Chicago & Alton R. Co.* v. *May,* 15 Am. & Eng. R. R. Cas., 320 (Ill. case), it was held that the mere fact that one of a number of servants who are in the habit of working together in the same line of employment for a common master has power to control and direct the action of the others with respect to such employment will not of itself render the master liable for the negligence of the governing servant resulting in an injury to one of the others without regard to other circumstances. On the other hand, the mere fact that the servant exercising such authority generally labors with others of a company will not of itself exonerate the master from liability for the foreman's negligence in the exercise of his authority over the others. Every case in this respect must depend upon its own circumstances. If the negligence complained of consists of some act done or omitted by one having such authority which act relates to his duties as colaborer with those under his control and which might just as readily have occurred with none of them having such authority, the common master will not be liable; for instance, if the section boss of a railroad company, while working with his squad of men on the company's road, should negligently strike or otherwise injure one of them, the company would not be liable, but when the negligent act complained of arises out of and is the direct result of the exercise of the authority conferred upon him by the master over his laborer, the master will be liable. The court will find various authorities to the same effect as the above cited in 5 Rapalje & Mack's Digest of Railway Law, 682.

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Brief for appellee.

Orr & Harrison, Hoke Smith, and *H. C. Peeples,* for appellee.

It seems singular that contributory negligence should be insisted upon in this court, after it has been passed upon in the court below and reviewed by the court below on motion for new trial, and in view of the decision of this court in *Nesbitt* v. *City of Greenville,* 69 Miss., 22.

Plaintiff was under the control of the engineer and did what the engineer told him to do. The rule of the defendant (Rule No. 547) provided that "when with the engine they (firemen) must obey the orders of the engineman." Rule No. 501 provided that "they (enginemen) are also responsible for the performance of duty by their firemen, must instruct them in such duties, when necessary, and must report incompetence or neglect of duty upon their part," etc. Rule No. 554 provided that "they (enginemen) must instruct their firemen in all matters pertaining to the operation and care of engines, and may allow them to handle the engine at stations, under their immediate supervision, but not permit them to do so under any other circumstances," etc.

Driven from the position that the fireman is not under the control of the engineman, counsel for the appellant seek to have a strained construction put upon the constitution of Mississippi, and to interpolate the words: provided the person injured receives his injury as a consequence of obeying some order of the superior or of the person having the right to direct or control his services.

It has been held that employers' liability acts should be construed liberally in favor of employes. 2 Labat's Master & Servants, secs. 639–663. Further, that the effect of the provision that the injured employe "shall have the same rights and remedies . . . . as are allowed to persons not employes" is simply that in the cases specified the defense of common employment is taken away. *Ib.,* sec. 661, note 3.

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Brief for appellee.

It would be vain, even were we so disposed, to try to induce this court to hold that the fireman could recover because of the negligence of the engineer, but for the present state of the law of this state. The clear and emphatic language of Chief Justice Woods, in *Lagrone* v. *M. & O. R. R. Co.,* 67 Miss., 592, following the cases of *Railroad Co.* v. *Hughes,* 49 Miss., 258; *Railroad Co.* v. *Petty,* 67 Miss., 255, seems to effectually determine what was the old rule.

The cases of Lagrone and others were all decided before the adoption of that constitution, and therefore can be helpful to us mainly to show what the law was and what the convention decided to change in the law. The Lagrone case held that though the section master "was superior in rank" to the appellant, and appellant "was actually under his direction and control," the two were fellow-servants. Within the same year the law of Mississippi was changed so as to provide that where the injury results from the negligence "of a superior agent or officer, or of a person having the right to control or direct the services of the party injured," a recovery could be had. So that, although the parties might be fellow-servants, as theretofore distinctly held, if one were superior to the other, or had the right to control the services of the other, or to direct the services of the other, there could be a recovery, if the superior, or the one having control or the right to give direction as to the services of the other, were negligent.

We respectfully submit, therefore, that if the Lagrone case had arisen after the adoption of the constitution the decision would have been different.

Let us come to the consideration of cases decided since the adoption of the constitution. In *Evans* v. *L., N. O. & T. Ry. Co.,* 70 Miss., 527, it was held that a brakeman could not recover for an injury caused by the negligence of an engineer, because the engineer was not the superior of the brakeman, nor did he have the right to control or direct the services of the brakeman. It did not appear in that case that the relation of the engineer

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Brief for appellee.

to the brakeman was defined by any particular rule of the railroad company, or was in any way different from the ordinary and usual relations of such employes. If the case had been one of conductor and brakeman, under the ordinary relations of those employes and the rules generally in force on railroads as to them, the case would have been one which it seems would have been within the plain language of the constitution. *R. & D. Ry. Co.* v. *Rush,* 71 Miss., 987.

In *Illinois, Etc., R. R. Co.* v. *Price,* 72 Miss., 862, it was held that the yardmaster and switch engine foreman (who is equivalent to the conductor) were the superior servants to the brakeman and for their negligence in failing to call his attention to the danger in coupling cars, he could recover.

In *Farquhar et al.* v. *A. & V. Ry. Co.,* 78 Miss., 193, it was held that a yardmaster riding on a switch train was a fellow-servant of the engineer. No attempt was made to bring that case under the constitution, but it was sought to induce the court to review previous decisions as to who were fellow-servants outside of the constitution.

In *Fenwick* v. *Illinois, Etc., R. R. Co.,* 100 Fed. Rep., 247, a case arising in Mississippi, it was held that a member of a switching crew was a fellow-servant of another of the crew who had been temporarily made foreman, and was not within the constitutional provision. It appeared that the temporary foreman had no authority to command, was of the same rank, and had no power to employ or discharge.

This decision is not controlling here, and while it is from a court of high rank and ability, we venture to say that it is of somewhat doubtful authority, since the fact that the one was only temporarily foreman should not matter, and the right to employ or discharge is not controlling as to superiority or the right to direct the services of another.

Let us turn to cases decided elsewhere. *Gal., H. & L. A. Ry. Co.* v. *Ford,* 46 S. W., 77 (Tex. Civil App.); *Houston & T. C. R. R. Co.* v. *Stuart,* 48 S. W., 799 (801 Tex. Civil App.);

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Houston & T. C. R. R. Co. v. *Stewart,* 50 S. W., 333 (92 Tex., 40); *St. Louis, Etc., Ry.* v. *Tuohey,* 67 Ark., 209 (54 S. W., 577); *St. L., I. M. & S. Ry. Co.* v. *Thernard,* 70 Ark., 411; *Davis* v. *N. Y., N. H. & H. R. Co.,* 34 S. E., 1070 (159 Mass., 532); *C., H. & D. R. Co. v. Margrat,* 37 N. E., 11 (51 Ohio St., 130); *Union Pacific Ry. Co.* v. *Doyle,* 70 N. W., 43 (50 Neb., 555); *Criswell* v. *Montana, Etc., Ry. Co.,* 42 Pac., 767 (17 Mont., 189); *Rutherford* v. *Southern Ry. Co.,* 56 S. C., 446 (35 S. E., 136); *Bussey* v. *C. & W. C. Ry. Co.,* 30 S. E., 477 (52 S. C., 438); *Peirce, Receiver,* v. *Van Dusen,* 78 Fed., 693, 705; *C., H. & D. R. Co.* v. *Thiebaud,* 114 Fed., 918; *Southern Pac. Co.* v. *Schoer,* 114 Fed., 466.

Argued orally by *James T. Harrison,* for appellee.

WHITFIELD, C. J., delivered the opinion of the court.

We have already, in the original opinion in this case (82 Miss., 48), and in response to the suggestion of error, held that under Rule 574 of the company, providing that "when with an engine they must obey the orders of the engineman," as applied to the facts of this case, this engineer was the superior officer of the fireman, and a person having the right to control and direct the services of the fireman, within the meaning of sec. 193 of the constitution of 1890. That holding is the law of this case. No sound principle requiring the fireman, in the interest of the safety of the traveling public, carefully to discharge all the duties of his station in the varying circumstances of different cases, should be disregarded. We deal with this case on its particular facts, and under the rule we have quoted. The engine in this case was leaky, and the coal and water short. The train had been delayed many hours on account of a wreck. It was not only requisite that the train should reach Columbus, but that the engine, when it did reach Columbus, should have a good fire, since the engine was to be turned over to the hostler to coal it up and get it ready to go out again soon after. The

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distance from Steen's to Columbus was only eight or nine miles. The train was running at a rate, perhaps, of twenty to twenty-five miles an hour. Some witnesses stated fifteen, and some thirty, miles an hour. At the lowest estimate it would only take about half an hour, and, at the highest, a quarter of an hour, to run into Columbus. The engineer had told the fireman to keep her "red-hot; we are going in." "Keep her red-hot"—meaning, of course, for the fireman to give his concentrated attention to keeping up the steam. The fire had to be constantly fed. The coal had to be moved twice to get it out from the rear of the tender to the fire box. A disinterested witness shows that the furnace door was open as the engine approached the train with which it collided. The fireman was evidently working hard at his job of keeping the furnace hot. The fireman was under the duty of obeying the directions of the engineer, which directions amounted to a command to him to be especially attentive to keeping the furnace red-hot for the few minutes it would take to run into Columbus. The fireman did not know or suspect that the engineer was asleep. The engineer was at his accustomed place. The fireman was at work behind him, the engineer's back being towards him. The work of the fireman took him, back and forth, from the rear of the tender, the sides of which would naturally shut off his view, and the glare of the furnace might well have blinded his eyes to a greater or less extent. The engineer gave no long whistle at the yard limits to warn the fireman that the train had come to the yards, as it was his duty to have done. In addition to this, the testimony shows that the grade was such at the coal chute as to require the engine to go fast to get up it. The distance from this coal chute to the place of collision was about one-half mile. It would not have taken exceeding one to two minutes to run that distance at the rate at which the train was moving. The fireman was shown not to have been familiar with the yard. The night was dark and foggy. The attention of the fireman

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was called to the engineer just before the collision, and he sprang to awaken him, saw the headlight of the opposite engine, turned too late to jump, and was caught. The fireman had never been in the city of Columbus in the daytime but twice, and was accustomed to go right to his boarding house on leaving his engine. The command of the engineer to the fireman evidently meant, in view of the very little coal and very little water they had, and of the great delay which had been caused by the wreck, that he was going to do all he could to make up time and get to Columbus with the small supply of coal and water he had before it gave out; and his order "to keep things red-hot" the fireman was proceeding to diligently execute from the time it was given until the collision. It is impossible to hold, under this testimony, that the fireman was guilty of contributory negligence.

The chief contention of learned counsel for appellant is that the clause in sec. 193 in the constitution of 1890 making the company liable to an employe, where his injury results from the negligent act of one having a right to direct his services, should be so construed as to mean that such employe can so recover only if and when the employe is injured whilst executing at the very time of his injury some special command or order given by his superior officer, or by the person having the right to control or direct his services, while such superior officer, or such person having the right to direct his services, is at the time in the exercise of the right to superintend him, or to so direct his services; and this argument is pressed with great ingenuity and ability. The authority chiefly relied on by learned counsel for appellant is the case of *Dantzler* v. *De Bardeleben Coal & Iron Co.*, 101 Ala., 309 (14 South., 10; 22 L. R. A., 361). But so far as that case touches this particular contention, it rests upon the express language of the Alabama employers' liability act, which provides that the employe cannot recover in such case unless the negligent act

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of the person vested with superintendence is done "while such person is in the exercise of superintendence entrusted to him." There is no such language in our constitution. The supreme court of Alabama says that their act is modeled after the English statute, which also contains a similar clause to the one cited. A single consideration will show the inapplicability of the Alabama case. Suppose the Alabama statute should be so amended as to leave out this clause above cited, and an injury should occur under the new statute, which would then be like sec. 193 of our constitution; would counsel, in Alabama, be heard to argue, with that clause left out, that the employe could only recover by showing that the superior officer, by whose negligence he was injured, was at the time in the exercise of his superintendence—giving him some special order or command which caused the injury? Manifestly not. The conclusive reply would be that, when the legislature dropped the clause cited, it meant to enlarge the liability beyond such as would obtain merely whilst the superior officer was in the exercise of his superintending power. And that is just the condition and effect of our constitution and statute, which are not limited by any such words as "while in the exercise of superintendence entrusted" to such superior officer, or such person having the right to direct the services of the employe. There seem to be three classes of employers' liability acts. In many states the legislature has entirely abrogated the fellow-servant rule. Others, as Massachusetts and Alabama, following the English statute, have adopted statutes, which have declared the master liable only when the superior officer entrusted with superintendence is actually engaged in giving his orders as superior officer when the injury occurs. It is proper to note that the Alabama statute to this effect was adopted in 1885, some years before our constitution was adopted. It is perfectly plain that the framers of our constitution intended to go beyond this rule. The gross absurdity of the extreme application of the old common-law rule as to fellow-servants, illustrated in this state in the cases

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of Lagrone and McMaster, had become intolerable, and the very object of the constitutional provision was to enlarge materially the right of employes to recover; and so sec. 193 expressly provided, as do the employers' liability acts of many other states, that the injured employe should have the right to recover where the injury resulted from the negligence of a superior agent or officer, or of some person having the right to direct or control the services of the party injured, and also in certain other specific categories. This is the rule of our constitution (sec. 193), and of § 3559, Code 1892, passed in pursuance thereof. It would be the most manifest departure from proper construction to give a narrow, restricting interpretation to these plain provisions in our organic law, framed with the view of expanding and enlarging the rights of injured employes, and abrogating, in part, the harsh rules of the common law on this subject. It has been expressly held that all of these employers' liability acts are, in view of the object of their passage, to be construed liberally in favor of employes. Labat's Master and Servant, Vol. 2, sec. 639, through sec. 663.

Our constitution plainly means that wherever an employe is injured by the negligence of a superior officer, or of a person having the right to direct or control his services, such employe is entitled to recover, whether he is at the time obeying any special command born of the exigencies of the occasion, or is engaged merely and simply in the discharge of his ordinary routine duties; such superior officer or person also being engaged in discharging simply the primary duties of his station, and not the positive duties of the master. No such exception can be justly ingrafted on the plain stipulation of our constitution and statutes. We find the construction which we announce already well settled in many states construing similar statutes. In South Carolina, in the case of *Rutherford* v. *Southern Railway*, 56 S. C., 446 (35 S. E., 136), the court construed the constitution of South Carolina adopted in 1895, which is an exact rescript of sec. 193 of our constitution, just as we here construe

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ours. This case is very persuasive, because it is upon an identical constitutional provision. In *Criswell* v. *Montana Cent. Ry. Co.*, 17 Mont., 203 (42 Pac., 769), the court was called upon to construe a statute along this line, and said: "The action of the court in respect to these instructions was confessedly based upon the opinion that sec. 697 (division 5), p. 817, Comp. St., 1887, which reads as follows: 'That in every case the liability of the corporation to a servant or employe acting under the orders of his superior, shall be the same in case of injury sustained by default or wrongful act of his superior, or to an employe not appointed or controlled by him, as if such servant or employe were a passenger'—constituted the law fixing the liability of the defendant in the case, and that the declaration of law, as requested, was in conflict with that statute. This statute is therefore brought before this court for the first time for judicial interpretation. The counsel for the defendant contends that under the common law the defendant corporation has performed its whole duty to the plaintiff, as its employe, when it has used ordinary and reasonable care in providing (1) safe machinery, (2) furnishing a safe place to work, and (3) competent fellow-servants to prosecute the common employment, and that the statute in question does not increase or change the defendant's liability at common law; that it does not change the common law in relation to fellow-servants; that it does not establish the superior servant doctrine and enlarge the common-law liability of the defendant in any respect, and was not so intended by the legislature. The learned counsel for the defendant, in his able and exhaustive brief, has cited numerous authorities in support of the common-law rule applicable in such cases, but these authorities do not attempt to discuss the effect of such legislation as is here involved upon the common-law rule. It cannot be disputed that the common-law rule has been modified, if not changed, both in England and in many of the American states, by recent legislation on the subject. So we think we may omit a discussion of the common-law rule, and look to the course and

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effect of modern legislation on this subject. Beach, in his work on Contributory Negligence (sec. 376), says: 'It became evident early in the course of the development of the law upon this point that, in order to preserve to the employe any vestige of the right of action which the common law gave him against his employer, in a proper case, for personal injuries attributable to the negligence of another, and received in the course of the common employment, the tendency to extend the rule which had its inception in England in the case of *Priestly* v. *Fowler*, 3 Mees. & W., 1, and in the United States in the early cases of *Murray* v. *Railroad Co.*, 1 McMul. (S. C.), 385 (36 Am. Dec., 268), and in *Farwell* v. *Railroad Co.*, 4 Metc. (Mass.), 49 (38 Am. Dec., 339), and under the operation of which the defense of a common employment had come to be urged to the practical destruction of all such rights of action, would have to be checked, and could only be checked by legislation. Accordingly, on the 7th of September, 1880, parliament changed the law of England by passing the employers' liability act (43 and 44 Vict., ch. 42), which, pending its final enactment, was popularly known as the "Gladstone Bill," and which at the time attracted much attention both here and in England.' Section 377 of the same work contains a resume of this act of parliament, and subdivisions 2 and 3, as the author has subdivided the act, are instances in which the master is liable for injuries received by a servant from the negligence of a superior. These subdivisions are as follows: '(2) By reason of the negligence of any person entrusted with superintendence. (3) By reason of the negligence of any superior workman whose orders the injured person was bound to obey.' The same author, in sec. 379, says: 'Comparatively recent legislation in several of the states of the Union has in some degree modified, for us in this country, the rule of nonliability which the courts of every jurisdiction, as we have seen, have uniformly declared. In California, Dakota, Georgia, Kansas, Iowa, Mississippi, Montana, Rhode Island, Wisconsin, Wyoming, Alabama, Massachusetts, and Missouri statutes, the

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substance of which is set out in the notes, have been passed, under the wholesome operation of which the old rule of nonliability is practically abrogated. Except in California and Dakota, it may be said that in each of the states just mentioned the old rule is entirely abandoned, and an adequate remedy provided by the statutes for the proper protection of railway employes, while in California and Dakota the statutes define the limit of liability, and, *quoad hoc,* recognize and assert the propriety of legislation upon this subject.' So it will be seen that, in the opinion of this author, the common-law rule of nonliability in such cases is practically abrogated by such legislation, and entirely abandoned in the states named, including Montana, except in the case of California and Dakota. But we are not without further light and assistance in the interpretation of the statute under discussion. It has been the subject of direct construction by two of the most respectable courts of the country. In the United States circuit court of the northern district of Iowa, in the case of *Ragsdale* v. *Railroad Co.,* 42 Fed., 383—a case involving directly the construction of this statute and its effect upon the common-law rule insisted upon in this case—Judge Shiras, delivering the opinion of the court, said, 'On the part of plaintiff it is further claimed that the statute of Montana in force when the accident happened modifies the common-law rule in regard to the liability for the acts of fellow-servants;' and, after quoting the statute, he continues: 'This statute does not go to the length of abrogating the general rule that the master is not liable to an employe for the consequence of the negligence of a co-employe, but it does enact, in effect, that a superior is not a co-employe with an inferior, and that one may be a superior, as compared with another, even though the former does not control the latter. The enactment is based upon the known fact that in carrying on the business of railroading there are recognized grades among numerous classes of employes, and, while they are all working for a common master, and for an ultimate common result, they are practically not all

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servants. The present plaintiff was a fireman, and his duties were limited generally to attending to the furnace and other matters upon the engine. He did not belong to that class of employes that were charged with the duty of controlling the movement of the train. The answer expressly avers that the collision was caused by the negligence of the officials in command of the movement of train No. 1, and there is no fact averred which tends to show that, as to them, the plaintiff occupied any other position than that of an inferior, within the meaning of the statute in Montana. The act of negligence set up in the answer is that train No. 1 was moved past the telegraph station in violation of the rule of the company, and it is averred that this was done by those in command of such train. It will certainly not be claimed that a fireman upon the engine is an employe charged with the control of the moving of the trains—a duty primarily imposed upon the conductor—and it is certainly the fair inference that in the moving and running of trains the conductor is the superior of a fireman. In other words, the conductor, or party charged with the control of the train, is a superior, as compared with a fireman, within the meaning of the Montana statute. Under this section the corporation is made liable to any one of its employes who, without negligence on his part, is injured by the default or wrongful act of a superior, even though the latter has no control over the former. Whether, therefore, the liability of the defendant corporation is to be determined under the common-law rule, or under the statute of Montana, the facts set forth in the answer do not show that the act of negligence causing the collision and consequent injury to plaintiff was the act of a co-employe, but, on the contrary, it would appear therefrom that such an act of negligence was the act of the representative of the corporation who was also the superior of the plaintiff. This being the conclusion, it follows that the answer is insufficient, and the demurrer thereto is sustained.' "

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After sustaining the demurrer in the case, as shown above, the defendant amended its answer, and alleged that plaintiff's injuries were the result of the negligence of the engineer of the train on which plaintiff was employed, whereas in its original answer the defendant had alleged that the injuries of plaintiff resulted from the negligence of the conductor of another train. The court sustained a demurrer to the amended answer, and, in doing so, Judge Shiras said: "The amended answer shows that the engineer was primarily charged with the duty of halting the train at Evaro Station, and that he negligently failed in the performance of this duty. It seems to me that the same rule must be applied to the one case as to the other, and that the reasons which sustain the liability of the company in case of the negligence of the conductor apply with equal force to the negligence of the engineer, when such negligence occurred in a matter touching the actual movements of the train, and which was at the time wholly under the control of the engineer. In such matters the engineer represents the company, and for his negligence the company must respond. In the circuit court of appeals, eighth circuit, in *Northern Pac. R. R. Co.* v. *Mase,* 11 C. C. A., 63 (63 Fed., 114), decided July 16, 1894—a case involving directly the interpretation of the Montana statute under discussion, and its effect upon the common-law rule—Judge Sanborn, speaking for the court, said, 'The result is that the right of recovery in this action, if it exists at all, must rest on the statute of Montana,' and, after citing the statute, proceeded as follows: 'This section is found in a chapter of the general laws of Montana relating to railroad corporations, and it seems to affect the liability of such corporations only. It goes without saying that the purpose of this statute was to extend the liability of railroad companies to their servants for the negligence of servants of a higher grade. . . . The statute is inartificially drawn, but its meaning is not doubtful, and its obscurity at once disappears if the clause "or to an employe not appointed or controlled by him" is transposed to its gram-

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matical and logical position in the sentence, and placed before the verb. Then the statute would read: "That in every case the liability of the corporation to a servant or employe acting under the orders of his superior, or to an employe not appointed or controlled by him, shall be the same in case of injury sustained by default or wrongful act of his superior as if such servant or employe were a passenger." Now, the conductor whose negligence in leaving the switch open caused the death of the fireman on another train in this case was the superior of that fireman in the employment of the same master. His rank or grade in the service was higher. The fireman, it is true, was not acting under his orders, and was not one of the first class protected by the statute, but he was an employe "not appointed or controlled" by this superior, whose default caused his injury; and he was clearly one of the second class, to whom a right of action for such a default was given by this statute. The effect of the statute is to give a cause of action against the railroad company to every servant who is himself without fault for the default or wrongful act of any superior servant, whether or not the latter appointed or exercised any control over the former before or at the time of the infliction of the injury.' " It is to be observed that this is a decision materially aiding us here. Another decision from Montana, cited by learned counsel for appellant, rendered after this one, was simply a decision construing the common-law principle after the repeal of the statute considered in 17 Mont., 42 Pac., *supra*.

In *Peirce* v. *Van Dusen*, 78 Fed., 693 (24 C. C. A., 280), the court, through Justice Harlan, of the supreme court of the United States, construing the following statute of Ohio: "In all actions against the railroad company for personal injury to, or death resulting from personal injury of, any person, while in the employ of such company, arising from the negligence of such company or any of its officers or employes, it shall be held in addition to the liability now existing by law, that every person in the employ of such company, actually having power or

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authority to direct or control any other employe of such company, is not the fellow-servant, but superior of such other employe; also that every person in the employ of such company having charge or control of employes in any separate branch or department shall be held to be the superior, and not the fellow-servant, of employes in any other branch or department who have no power to direct or control in the branch or department in which they are employed"—said: "It is next contended by the plaintiff in error that if Van Dusen was injured by the negligence of Bartley, the conductor, he is not entitled to recover, for the reason that the latter was not negligent in the performance of any duty imposed by law on the master personally, but only in respect of the performance of work pertaining to him and other employes in the same work. The principal authorities cited in support of this view are *Railroad Co.* v. *Keegan,* 160 U. S., 259 (16 Sup. Ct., 269; 40 L. ed., 419), and *Stockmeyer* v. *Reed* (C. C.), 55 Fed., 259. If this contention were sustained, the statute of Ohio would be deprived of all practical value, and the manifest object of the legislature in passing it would be defeated. The Keegan and Stockmeyer cases enforced the general rule that a foreman or superintendent of a body of employes doing a particular service was a fellow-servant of those under him, and consequently the common employer was not liable to one of them for the negligence of the other. The very object of the statute before us was to prevent the application of that rule in Ohio as between a railroad company and its employes. Hence it is declared that every person in the employ of a railroad company, 'having power or authority to direct or control any other employe of such company, is not the fellow-servant, but the superior, of such other employe.' If, by force of the statute, Bartley was not a fellow-servant, but the superior of Van Dusen, he did not become, within the meaning of the statute, a fellow-servant, simply because he did some work of the kind done by Van Dusen. The object of the statute was to make one, to whom is committed by a railroad company the

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authority to direct and control employes in the same service, the representative, in respect of that service, of the common employer, so that his acts, within the scope of his employment, are the acts of the company, and his negligence its negligence."

In the case of *C., H. & D. R. Co.* v. *Thiebaud,* 114 Fed., 918 (52 C. C. A., 538), it was held that the provision in the statute of Indiana (Laws 1893, pp. 294, 295, ch. 130) allowing recovery by one employe for injuries sustained through negligence of a co-employe—"The person injured who is obeying or conforming to the order of some superior, at the time of such injury, having authority to direct"—was applicable, though the person injured was not acting at the time under any special direction of a superior, but merely acting in the line of his duty as an employe.

In Utah—Rev. St., 1898, sec. 1342, which, it is to be noted, was passed after the decision in the *Baugh Case,* 149 U. S., 368 (13 Sup. Ct., 914; 37 L. ed., 772), cited by learned counsel for appellant—the statute provides "that all persons engaged in the service of any corporation, who are entrusted by such corporation, as employer, with the authority of superintendence, control, or command of other persons in the employ or service of such employer, or with the authority to direct any other employe in the performance of any duties of such employe, are vice principals of such employer and are not fellow-servants." A fellow-servant was killed by injuries which he received in a collision caused by the negligence of his engineer in running his engine too rapidly in approaching yard limits. The court held that he was entitled to recover, notwithstanding the fact that the negligence was committed while the engineer was discharging the primary duties of the engineer, and not the positive duties of the master. It was held further that the master was liable for the negligence of said superior servant, the engineer, whether the negligence was committed while he (the engineer) was exercising his authority to command or superintend others or not. The statute construed in this case is substantially identical with the

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one we are construing in the case before us. The court, in the course of its opinion, fully recognized the old law of master and servant in its most extreme application, but it correctly held that this statute was a plain departure from the general rule of law; that there was no ambiguity in the terms, no uncertainty in its meaning, and no possible doubt of the meaning of the legislature in its enactment; that it was too positive to be disregarded, and its manifest legal effect could not be ignored; and, further, that to write into the statute that the master would not be liable unless the negligent servant was actually engaged in exercising his authority of superintendence or control would be to so amend it as to deprive it of the greater portion of its effect, in violation of its terms and of the intention of the legislature which its words clearly disclose. This case is precisely in point, and meets our hearty approval. It would seem utterly unreasonable to hold that an employe, under our constitution, can only recover where the engineer is attending at the same time to the positive duties of the master, for the obvious reason that the employe could have so recovered under the common-law rule in such case, and it needed no constitutional or statutory provision to give him this remedy.

We have examined with the greatest care all the authorities referred to by the learned counsel for the appellant. Many of them are decisions under the common law. In some of the cases statutes like ours were passed and were in force when the decisions were rendered, but the injuries occurred before the adoption of such statutes. The *Baugh Case,* modifying *C. & M. R. R. Co.* v. *Ross.,* 112 U. S., 377 (5 Sup. Ct., 184; 28 L. ed., 787), by a divided court, did not rest upon the Ohio statute which was construed in *Peirce* v. *Van Dusen, supra,* but rested on common-law principles as construed by that court.

We conclude this opinion with the following observations of the court in the case of *Southern Pac. Co.* v. *Schoer,* 114 Fed., 467 (52 C. C. A., 268; 57 L. R. A., 707). The court says: "The main complaint of the company is that the court below

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charged the jury that, under the statutes of the state of Utah, the engineer of the locomotive on which the deceased was a fireman was the representative of the company, and that his negligence, if any, in following the first section of the train too closely, and in running his engine too rapidly as he approached the yard limits at Terrace at the time of the collision, was the negligence of the company. It is not denied that the engineer in charge of the engine upon which the deceased was employed at the time of his death was entrusted by the company with authority to superintend and direct him in the performance of his duties, but it is contended that this master was not responsible for his negligence, because the negligence which caused the injury was committed while the engineer was discharging the primary duty of a servant, and was not engaged in performing one of the positive duties of the master, and because this negligence was committed while he was not exercising his authority to superintend the action of the fireman, or to direct him in the performance of any of his duties. The argument in support of the first contention is: Under the general law the master was not liable for the negligence of the engineer, because he was discharging one of the primary duties of the servant, and was not performing one of the positive duties of the master, when he committed the fatal act of negligence. The purpose and effect of the sections of the statute of Utah which have been cited were not to change or to extend the liabilities of masters for the negligence of their servants, but their sole object and effect were to give an authoritative legislative definition of the terms 'vice principal' and 'fellow-servant,' and to leave the liabilities of the masters for the acts of their servants as they were before these sections were enacted. Therefore, since the Southern Pacific Company would not have been liable for the negligence of this engineer under the general law, it is not liable for it under this statute. The truth of the major premise of this syllogism is conceded. In the absence of a statute, the liability of a master for the negligence of his servant is a question

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of general law, upon which the decisions of the state courts are not controlling upon the federal judiciary, and, unless the negligent servant is the general manager or general superintendent of the business of the master, it is not his grade, rank, or authority over other employes, but it is the nature of the duty he is discharging when he is guilty of the negligence, that determines whether he is a vice principal or a fellow-servant, and when the master is liable or exempt from liability for the injury caused by his carelessness. If he is discharging one of the absolute duties of the master, the latter is liable for his acts and for his negligence. But if he is discharging one of the primary duties of a servant, his employer is exempt from liability. *Railroad Co.* v. *Baugh,* 149 U. S., 368 (13 Sup. Ct., 914; 37 L. ed., 772); *Railroad Co.* v. *Conroy,* 175 U. S., 323 (20 Sup. Ct., 85; 44 L. ed., 181); *City of Minneapolis* v. *Lundin,* 58 Fed., 525 (7 C. C. A., 344); *Coal Co.* v. *Johnson,* 56 Fed., 810 (6 C. C. A., 148). The construction and maintenance of a railroad is the business of the master. Its operation is the business of his servants. The failure to exercise reasonable care in construction and maintenance is the negligence of the master. The failure to exercise such care in the operation of a railroad is the negligence of the servant, for which the master is not liable. The alleged negligence of the engineer of the second section of this train in running his engine too close to the preceding section, and too rapidly as he approached the yard limits at Terrace, was negligence in the operation of the railroad, for which the Southern Pacific Company was not liable, in the absence of a statute which changed the rules and principles of the general law. *Railroad Co.* v. *Needham,* 63 Fed., 107 (11 C. C. A., 56; 25 L. R. A., 833); *Railroad Co.* v. *Mase,* 63 Fed., 114 (11 C. C. A., 63); *Brady* v. *Railroad Co.,* 114 Fed., 100 (52 C. C. A., 48; 57 L. R. A., 712). These principles and authorities amply sustain the first proposition of counsel for the plaintiff in error. But the correctness of the second premise of their syllogism is not so obvious. A vice principal is the representative of the

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master, for whose acts and negligence the master is responsible. *City of Minneapolis* v. *Lundin*, 58 Fed., 525 (7 C. C. A., 344). The rule that the master is liable for the negligence committed by a servant while he is discharging one of the positive duties of the master, and that he is not liable for his negligence when he is performing one of the primary duties of a servant, was not adopted to measure the liability of the master for the acts of a vice principal. It was established to determine who were and who were not vice principals. The master has been invariably held liable by all the courts for the acts and for the negligence of his vice principals. The question upon which they have disagreed—the question which has occasioned debate—has been who were vice principals. Under the general law in the federal courts, and in many of the state courts, that question has been answered by the rule which has already been stated, based upon the nature of the duty the servant was discharging when the negligence was committed. In this condition of the law and of the decisions, the legislature of the state of Utah enacted the statute which has been quoted. It declares that employes who are entrusted by their employers with the authority to superintend other employes of the same master, or with the authority to direct any other employe in the discharge of any of his duties, are vice principals of such employer. This declaration is a plain departure from the general rule of law which we have been considering—an unequivocal declaration that servants who have the authority to direct and superintend other servants are vice principals of their masters, whether they are engaged in discharging the duties of their employers or the duties of their servants. There is no ambiguity in the terms, no uncertainty in the meaning of this statute, and no possible doubt of the purpose of the legislature in enacting it. It is too positive to be disregarded, too plain for construction, and its manifest legal effect cannot be ignored. To sustain the position of counsel for plaintiff in error that this clear and authoritative declaration of the relation of superior servants to their masters in the

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state of Utah did not modify or extend the liability of the master beyond that fixed by the general law would be to defeat the manifest object of the legislature in passing this act, and to arbitrarily strike down a law which that body had the undoubted right to enact and to enforce, for the unquestioned rule is that the states have the right to regulate, within reasonable limits, the relation between employers and employes within their borders, and to fix by legislative enactment the liabilities of the former for the acts and negligence of the latter. *Railroad Co.* v. *Baugh,* 149 U. S., 368 (13 Sup. Ct., 914; 37 L. ed., 772); *Railroad Co.* v. *Hogan,* 63 Fed., 102 (11 C. C. A., 51). Our conclusion is that secs. 1342 and 1343 of the revised statutes of Utah of 1898 make all servants employed in the service of a master doing business in that state, who are entrusted by him with authority to command his other servants, or with the authority to direct another of his servants in the discharge of his duties, vice principals of their master, and charge him with liability for their negligence, whether it was committed in the discharge of the positive duties of the master or in the performance of the primary duties of the servant. Another reason why counsel for the plaintiff in error insist that the Southern Pacific Company is not liable for the negligence of this engineer is that, when he committed the acts of negligence charged, he was not engaged in exercising his authority to superintend the fireman, or his power to direct the performance of any of his duties. It is earnestly contended that it is only when the superior servant is guilty while he is actually engaged in exercising his authority of superintendence and control over those subject to his direction that his master is liable for his negligence under the provisions of this statute. In support of this position, *Shaffers* v. *Navigation Co.,* 10 Q. B. Div., 356, 357; *Fitzgerald* v. *Railroad Co.,* 156 Mass., 293 (31 N. E., 7); *Brittain* v. *Railway Co.,* 168 Mass., 10 (46 N. E., 111); and *Dantzler* v. *Iron Co.,* 101 Ala., 309 (14 South., 10; 22 L. R. A., 361), have been cited, and these cases adopt and enforce the rule for which counsel

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contend. But they enforce it because the limitation which counsel seek to read into the statute of Utah was written into these statutes which these decisions were interpreting by the legislative bodies which enacted them. The employers' liability act of 1880 (43 and 44 Vict., ch. 42), sec. 1, subsec. 2, which the opinion in Shaffer's case was construing, charged the master with liability for injuries caused 'by reason of the negligence of a person in the service of the defendants, who had superintendence entrusted to him, while in the exercise of such superintendence.' The Alabama and Massachusetts statutes under which the cases from these states arose contain a like limitation. *Dantzler* v. *Iron Co.,* 101 Ala., 318 (14 South., 10; 22 L. R. A., 361); St. Mass., 1887, p. 900, ch. 270, sec. 1, subd. 2. The statute of Utah under which the case arose contains no such limitation, and no indication that the legislature intended to adopt any such restriction. On the other hand, it plainly declares that all persons entrusted by the master with the authority of superintendence of other persons in his employ are vice principals and not fellow-servants. This is a declaration that they are vice principals not only when they are engaged in performing acts of superintendence and control, but at all times when the authority of superintendence and control is vested in them, and they are engaged in discharging their duties as servants of their master. This statute is so plain that it cannot be lawfully construed. To write into it the limitation suggested by counsel, and found in the laws of England, Alabama, and Massachusetts, would be to so amend it as to deprive it of the greater portion of its effect, in violation of its terms and of the intention of the legislature which its words clearly disclose. It would be judicial legislation, which it is not in the province of the courts to enact."

It follows from these views that the judgment is affirmed.

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Syllabus.

EDWARD SCHRADER v. STATE OF MISSISSIPPI.

1. CRIMINAL LAW. *Murder. Jurors. New trial.*

If a juror on his *voir dire* states that he had formed and expressed an opinion as to the guilt of the accused, but that his opinion was not fixed and would not affect his verdict, and the accused does not offer to challenge him either for cause or peremptorily—his peremptory challenges not having been exhausted—he will not after conviction be granted a new trial because the juror had before being empaneled expressed the opinion that the accused ought to be convicted.

2. SAME. *Conflicting evidence.*

The finding by the trial court on a motion for a new trial that a juror was not hostile to the accused will not be reversed where the testimony on the subject is conflicting.

3. SAME. *Instructions. Already given.*

It is not error to refuse an instruction the substance of which has already been given in another instruction.

4. SAME. *Previous difficulty. Third parties. Evidence.*

Evidence is admissible in a murder case of a difficulty, prior to the killing, between decedent and a third party, although defendant was not present when it occurred, if it tend to prove that the defendant, taking the part of the third person, forced deceased to engage in the difficulty in which he was killed by defendant.

5. SAME. *Instruction.*

Where the defendant shot and killed the deceased he is not entitled to an instruction telling the jury to acquit if they believe from the evidence that defendant insulted and struck deceased and thereupon deceased shot defendant and defendant then killed deceased, failing to negative the idea that defendant provoked the difficulty with intent to overcome deceased.

6. SAME. *Improper argument.*

The language of the prosecuting attorney in his closing argument on a trial for murder, to the effect that he would show how people regarded the accused, and that policemen, knowing his past, did not try to stop him after the killing, did not constitute reversible error, though no evidence was introduced as to the character of accused.

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Statement of the case.

FROM the circuit court of Washington county.
HON. A. MCC. KIMBROUGH, Judge.

Schrader, the appellant, was indicted, tried, and convicted of murder, and appealed to the supreme court.

The evidence showed that one Connelly, early in the night, had a difficulty with one Anderson, and ordered him to keep out of his dramshop; that Anderson, after leaving, returned to the dramshop, and he and Connelly got into a fight, and were separated; at about the time they were separated, Schrader came in, and urged Anderson to fight Connelly, at the same time hurling some abusive epithets at Connelly; that Connelly made no reply, but walked out of the dramshop, leaving Schrader inside; that it was proposed by some one in the crowd that Connelly and Schrader retire to the back yard and fight it out; Schrader and Anderson and some others did go into the back yard, and stayed there a short time, but Connelly did not go; that when these men came back and got near to where Connelly was standing, Schrader approached Connelly, and abused him, saying, "I will fight you myself," and struck at Connelly; that both Schrader and Connelly started to shooting. The evidence is conflicting as to which shot first. Schrader was wounded and Connelly was killed. The defendant objected to the introduction of the testimony which refers to the difficulty between Anderson and Connelly before Schrader came in, because Schrader was not present, and there was no conspiracy shown to exist between Anderson and Schrader.

No evidence was introduced as to the character of defendant, and the language of the prosecuting attorney, made in his closing argument, and objected to by the defendant, is as follows: "I want to take the prisoner here, and walk with him and you that night, and show you how the people regarded him." "Knowing his past, the policemen did not try to stop Schrader." It is urged by appellant that these remarks were a successful

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Brief for appellant.

effort on the part of counsel to place in evidence the character of the defendant as being bad, when there had been no testimony as to his character.

The ninth instruction asked by the defendant, and refused by the court, is as follows: "Instruction No. 9. The court instructs the jury, for the defendant, that no words nor assault with the fist alone will justify the taking of human life, and even if the jury believe from the evidence in this cause that the defendant, Schrader, used insulting language to and struck at deceased, yet they will acquit the defendant if they further believe from the evidence that, at the time that the defendant undertook to strike deceased, deceased shot defendant, and defendant, being so shot, drew his pistol and fired and killed deceased, believing himself to be in actual or apparent danger of losing his own life, or of having some great bodily harm done him."

Jayne & Watson, for appellant.

The court below erred in permitting evidence to be introduced with reference to the first difficulty between Connelly and Anderson. From the beginning of such testimony to the ending of the state's evidence appellant interposed and insisted that any evidence with reference to a difficulty between Anderson and Connelly was inadmissible, because appellant was not present at such difficulty, and, further, because there was no conspiracy shown to exist between Anderson and the appellant. It was clearly the purpose of the state, in introducing this testimony, to create the impression that appellant was present at Connelly's dramshop for the purpose of aiding in a difficulty with Connelly. It is unjust to appellant that evidence tending to show his attack upon Connelly was premeditated by the introduction of evidence of what was said and done when he was not present, no conspiracy having been shown to exist. No authority is required to sustain this proposition.

During the prosecutor's argument exceptions were made to his speech. Once when he said, "I want to take the prisoner

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Brief for appellant.

here and to walk with him and you that night and show you how people regarded him," was nothing more nor less than a successful effort on the part of counsel to place in evidence the character of a man as being bad, when there had been no testimony as to character. True it is, counsel says that what he did say was that he was going to show from the evidence in the case and the testimony of witnesses before the jury, etc. But how could this help his cause, when there had been no evidence before the jury of character? We think under the testimony a new trial should have been granted to appellant, by reason of the fact that the juror, Mann, when he qualified as a juror, did so knowingly and corruptly. There can be no question, after he was subpoenaed and before he was examined on his *voir dire,* that he had stated to Calhoun and young Jayne what his purpose and intentions were—viz., to send Schrader to the penitentiary, which he was successful in doing. It is true, he disputed what these young men said, but the weight of evidence is entirely against his statement.

Under the facts of this case we do not believe that appellant should have been convicted of murder. The testimony is overwhelming that Connelly fired the first two shots, had shot Schrader nigh unto death, and that Schrader never fired on Connelly until he, Schrader, had received two terrible wounds. The testimony of everybody on the scene, except McLoughlin (who says that somebody else rather than Schrader shot Connelly) and two lewd women, all agree that Connelly fired first. The policeman, the captain of the police, and every other witness who saw the shooting, agreed that Connelly fired the first two shots. Captain Quinn says that when he begged Connelly to go off, Connelly said that he could take care of himself. It is true that Schrader was the beginner of the difficulty with Connelly, but it must be remembered that he only struck at Connelly with his fists, which did not deny Schrader the right of self-defense when Connelly assaulted him with a deadly

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Brief for appellee.

weapon. *Prine* v. *State*, 73 Miss., 838; *Smith* v. *State*, 75 Miss., 542, 630.

William Williams, attorney-general, for appellee.

As to the action of the court in admitting testimony of Frank Dorsey in regard to first difficulty between Anderson and Connelly: Schrader came in at an opportune moment of the second difficulty. Anderson had left the dramshop after the first difficulty and had returned. Connelly saw him in his house again and reminded him to stay out. The two clinched when these words were spoken, and the witnesses say Schrader appeared as they were being separated, or, as one witness says, while they were still clinched. The time is estimated by one witness as a half of a minute from the clinching till Schrader's appearance. As soon as Schrader appeared he began to urge Anderson to fight Connelly, saying he, Schrader, was Anderson's friend, and would back him. The witnesses say that Schrader seemed mad at that time. It seemed that Schrader had heard something besides the immediate row to stir his anger. His remarks were prompted by the information that his friend Anderson had been ordered out of the dramshop a short while before. Hattie Dozier says that Schrader, Nelson, Cloom, and Anderson passed her house just before they got to Connelly's dramshop immediately before the tragedy, and that they were talking excitedly and she heard some voice from the crowd say, "Go over there and fight Neill." These men were, at that time, evidently talking about the previous difficulty, and it was that which made them talk excitedly. They went immediately to the dramshop, and Anderson went into the house out of which the owner had ordered him to stay, and the other men, it seems, held back until the fight was begun by Anderson.

This testimony was competent to show the purpose with which Schrader went to the dramshop—namely, to champion the cause of his friend. His friend was backward, it appears, and no match for Connelly, at least he did not measure up to

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Schrader's exacting standard of aggressiveness. There was nothing improper in the remarks of prosecuting counsel, and they are all within the bounds of legitimate argument. *Cavanah* v. *State*, 56 Miss., 299; *Martin* v. *State*, 63 Miss., 505.

In addition to this, even if the remarks had been beyond the scope of legitimate argument, the verdict of the jury was clearly supported by the testimony before it, and not influenced by any improper argument. *Hemingway* v. *State*, 68 Miss., 371; *Lamar* v. *State*, 63 Miss., 265.

Argued orally by *J. M. Jayne*, for appellant, and by *LeRoy Percy*, for appellee.

TRULY, J., delivered the opinion of the court.

Four assignments of error are pressed on our consideration, and relied on by appellant to obtain a reversal of the judgment by which, upon a conviction of murder, he was sentenced to the penitentiary for life. We will consider them in the order in which the occurrence or ruling on which they are based, respectively, arose during the progress of the trial:

1. The first assignment is that appellant did not have a fair and impartial jury, in that after the trial it developed that one of the jurors (Mann) had previous to the trial expressed the opinion that the appellant should either be hanged or sent to the penitentiary, and that neither the appellant nor his counsel was advised of this. It is, of course, true that if a juror, upon his *voir dire*, corruptly conceals an opinion then resting on his mind as to the guilt of the defendant, and is, by reason of this concealment, accepted as a juror by the defendant, this alone will in many cases cause a reversal of the cause. But the record now before us shows that, when examined as to his competency, this juror fairly and frankly stated to the court and counsel that he had both formed and expressed an opinion as to the guilt or innocence of the accused, but he further stated that this was not a fixed opinion, and would not affect him in arriving at his

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verdict after hearing the evidence; that he had conscientious scruples as to the infliction of the death penalty, and would not like to be on a jury that would hang a man. This was a full disclosure on his part, and advised the appellant and his counsel of the mental attitude then occupied by the juror. It is not contended that the appellant sought or desired to challenge the juror either peremptorily or for cause, and it is conceded that he did not exhaust the challenges granted him by law. In addition to this, the trial judge had this question presented for decision by the affidavits and testimony taken in support of the motion for a new trial. He also heard the denial of the alleged statement by the juror, and, upon full consideration of these conflicting statements, he upheld the competency, veracity, and impartiality of the juror, and refused to sustain the motion. We cannot, on the showing here made, disturb this finding of fact. *Lipscomb* v. *State,* 76 Miss., 256 (25 South., 158); *Green* v. *State,* 72 Miss., 522 (17 South., 381). This assignment therefore cannot be sustained.

2. The second ground of error insisted on is that it was error in the trial court to permit the state to prove that the same night, and a short time before the killing, there had been a difficulty between Connelly, the deceased, and one Anderson. An inspection of the record, as a whole, makes it manifest that this testimony was clearly relevant and admissible. Without the knowledge of this fact before the jury, the language and conduct of appellant would have been inexplicable; but, advised of this, it became evident that appellant on this occasion was actuated by his friendship for Anderson, and a seemingly determined design to take his part of the quarrel and force Connelly to engage in a difficulty with him personally. This testimony shed light upon the occurrence, tended to sustain the theory of the prosecution, and enabled the jury to correctly and justly weigh the conduct of the actors and to judge of their motives. For these reasons, it was plainly competent. Wharton, Crim. Ev., secs. 23, 24.

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3. The third assignment of error is that the court erred in refusing the ninth instruction asked by the appellant. This action of the court was proper, upon two distinct grounds: First, the same principle of law embodied in the instruction refused was granted to the appellant in two other instructions given to the jury in his behalf; second, the instruction was in itself erroneous and inaccurate, and charged the jury that they should acquit the defendant, even though they believed that he killed the deceased in a difficulty in which he was the aggressor, while armed with a deadly weapon, and without negativing the idea that defendant provoked the difficulty with the intention of using the deadly weapon for the purpose of overcoming his adversary; and this limitation must be expressed in an instruction which correctly presents the legal theory which was here sought to be announced.

4. The remaining assignment is predicated of the language alleged to have been used by the prosecuting counsel in the court below, and, in considering this, we are not unmindful of the fact that words from an attorney so gifted and eloquent as the gentleman who protected the interest of the state would probably have great weight with the jury. But we are unable to see that the language complained of was in any way objectionable or unfair to appellant; that it infringed upon the rule, or was a violation, in any degree, of the privileges of counsel. Viewed in the light of the whole record, and waiving the conflict as to the exact expressions used, the line of argument indicated by the remarks excepted to, even if carried to its just and logical conclusion, would have been unobjectionable. Manifestly, therefore, it could not possibly constitute error when it was stopped, before fairly begun, by the objection of counsel for the appellant. The language employed does not come within any of the classes of argument condemned by this or other courts of last resort. It was not a misstatement of testimony. It was not an attack or an unauthorized reflection upon the character of the defendant, nor was it an appeal, direct or implied, to the pas-

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sions or prejudices of the jury. It was legitimate comment on the proven facts attendant upon the homicide. There are no hard-and-fast limitations within which the argument of earnest counsel must be confined, no well-defined bounds beyond which the eloquence of advocates shall not soar; and we find in this record no evidence that the speech under review in any manner trenched upon the proprieties or did any violence to the ethics of advocacy.

We have given each of the assignments of error urged on behalf of appellant earnest and painstaking examination. We have considered carefully the case here presented in all its phases. We find no error of law, and the record furnishes no reason for a belief that any verdict more lenient to appellant could or should be reached by a fair and impartial jury on any trial. The law was correctly expounded, and the verdict is amply supported by the proof.

Affirmed.

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Syllabus.

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RICHARD S. WEIR v. ANN J. JONES ET AL.

1. CHANCERY PLEADINGS. *Fraud. Facts must be pleaded.*

A bill in equity, to set aside a sale under a deed of trust on the ground of fraud, is demurrable, if it fail to state the facts of which the charge of fraud is predicated.

2. SAME. *Trust deed. Foreclosure. Notice.*

A bill in equity to set aside a sale of lands is demurrable, if it admit that the lands were regularly sold, under a valid deed of trust, for the collection of a just and past due debt, and that complainants knew of the sale in ample time to have enjoined the same on any valid objection, although it charge that the sale was the result of a conspiracy between the trustee and the holdor of a junior mortgage on the land, and that the beneficiary in the deed of trust did not desire to foreclose the deed when the sale was made.

3. SAME. *Substituted trustee. Duty.*

Where the beneficiary in a deed of trust regularly appointed a substituted trustee, by a writing containing a direction that the trustee proceed to foreclose the deed, it is the duty of the trustee to proceed as directed.

4. SAME. *Tender of interest.*

The trustee in a deed of trust to secure a past due debt is not required to postpone a duly advertised sale of the property because the debtor tenders part payment, the interest, in the absence of any provision to that effect in the deed.

5. SAME. *Foreclosure. Agreement with junior incumbrancer.*

If the beneficiary in a deed of trust had the right to have it foreclosed when the sale was made, the fact that it was made as the result of an agreement with a junior incumbrancer in no way affects its validity.

6. SAME. *Junior mortgage.*

Where a senior lien is duly enforced by the sale of land the validity of the salo is not affected by the invalidity of a junior mortgage.

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Brief for appellees.

FROM the chancery court of, second district, Carroll county.
HON. ADAM M. BYRD, Chancellor.

Jones and another, appellees, were complainants, and Weir, appellant, was defendant in the court below. From a decree in complainants' favor the defendant appealed to the supreme court. The opinion states the case.

Alexander & Alexander, and *J. N. Flowers,* for appellant.

[The briefs of counsel for appellant were lost from the record before it reached the reporter.]

Brame & Brame, and *J. S. Smith,* for appellees.

The whole gravamen of the bill is that the defendant, Weir, through fraudulent conduct and a breach of trust, secured the legal title to the land, and a demurrer will not lie to such a bill. The defendant in answering the averments of fraud and misconduct would have to answer the entire bill. Having done this, he could not demur, because a defendant cannot answer and demur at the same time. He may demur to a part of the bill and answer a part, but the answer and demurrer must refer to separate and distinct parts. He cannot answer the whole bill and then demur, because the answer necessarily waives or overrules his demurrer. *Fall* v. *Hafter,* 40 Miss., 606; *Hentz* v. *Bank,* 76 Miss., 429; *Sledge* v. *Dixon,* 81 Miss., 501.

In *Hentz* v. *Bank,* this court states the rule which we think applicable to this case in the following language: "It is well settled, of course, in this state, that when a bill charges fraud that is material and which, if true, entitles to relief, the respondent should answer, denying the fraud. He may then demur, if the demurrer be limited to other separate and distinct parts of the bill, setting up equitable grounds for relief disconnected from the fraud."

Disconnected from the fraud and breach of trust in this case, there is nothing for the demurrer to reach; therefore, manifestly, it was properly overruled.

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Brief for appellees.

We beg to call the especial attention of the court to the fact that the bill charges that the reason the land was sold was because of the failure of the complainants to make to the mortgage company the payment due for the year 1901. This is recited in the deed from the trustee, and yet this is the very payment that the trustee, Flowers, refused to accept. Thus showing that the fraudulent trust deed or mortgage obtained by the defendant, Weir, from the complainant under the peculiar circumstances alleged in the bill would naturally affect the sale of the property under the trust deed of the mortgage company, the bill alleges that the trustee himself stated that it would be useless for the complainants to make the payment due the mortgage company, because the defendant, Weir, would, notwithstanding this, sell the property under his mortgage.

Even if there had been no collusion between the trustee of the mortgage company and the defendant, Weir, the fact that the defendant, Weir, had tied up the property of the complainants by securing a mortgage thereon for a large amount which represented a fictitious and fraudulent debt, when he knew that this was the only property or means that the complainants owned, would be in itself sufficient to authorize a court of equity to set aside the sale, especially in view of the inadequacy of the price and the fact that the defendant, Weir, was himself the purchaser in violation of his trust.

It will be borne in mind that the rights of no third persons are involved and that the question is one addressed to the conscience of the court as to the right of the defendant to hold the advantage he has wrongfully and unjustly obtained as against the complainants—that is, whether he shall be allowed to hold this valuable plantation for $1,287.76, when it appears that one hundred acres of land, less than one-fifth of the whole, could have been and would have been sold for $1,250 but for his interference.

The agency or trust of the defendant, Weir, was voluntarily assumed by him. He was under no obligation to assume it.

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Brief for appellees.

He was not called upon to look after the interest of complainants; and, notwithstanding their misfortune, if he had dealt with them at arm's length and had purchased at a fair sale, made under the trust deed of the mortgage company, he would occupy a very different position before the court. But he undertook certain obligations, from which he could not recede in order to advance his own interest at the sacrifice of those which he had undertaken to safeguard on behalf of complainants. Although he may have intended at the outset to aid the complainants, yet he did not assume this trust through motives of disinterested philanthropy or charity. He desired to realize the profit which there would be on the trade of the tenants on the plantation. It was no doubt a source of great profit for him to supply them, and this consideration no doubt influenced him at first; but afterwards, as matters progressed and when misfortunes had overtaken the complainants, he conceived the design of securing a title to the plantation, and this temptation was so great that he yielded to it, although it involved a breach of trust and a violation of his express agreement to aid the complainants in protecting this very property.

The inquiry suggests itself, Why did not the defendant undertake to sell the property under his own mortgage? The answer is manifest: Being the mortgagee, although with a power of sale, he could not purchase at his own sale. *Houston* v. *Building Association,* 80 Miss., 31.

The fact, however, that he could not become the purchaser at his own sale afforded no reason why he should not sell the property under his mortgage, and let others buy. The very fact that he failed to do this indicates two things: First, that he desired to become the owner of the property himself; and second, that he did not wish to go into a court of equity to foreclose his mortgage. Therefore, he set about procuring the foreclosure of the trust deed of the mortgage company in order that he might purchase thereunder, at the same time holding his own fraudulent mortgage on the record and in the eyes of the

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Opinion of the court.

public to cover up the equity of redemption and thereby prevent others from bidding at the sale under the trust deed of the mortgage company. It is expressly charged in the bill that this was his purpose and that the purpose succeeded, and this fact is also admitted by the demurrer.

Argued orally by *C. H. Alexander,* for appellant.

TRULY, J., delivered the opinion of the court.

No principle of equity jurisprudence is more firmly established than that, where fraud is relied on as a basis of relief sought from a chancery court, the facts of which the charge of fraud is predicated must be specifically stated with full definiteness of detail. No general averment of a fraudulent course of business, and no bare statement of a corrupt design on the part of the defendant, is sufficient. The acts themselves which are claimed to be fraudulent must be clearly set out. It must further appear, by definite averment, in what manner the fraudulent acts wrought injury to the complainant. Fraud cannot be inferred, but must be distinctly charged, and with such fullness and precision that a court of chancery would be enabled to grant full and complete relief and redress should the bill of complaint be taken as confessed. A court of equity, from a mere vague and indefinite statement that a certain course of conduct was in pursuance of a fraudulent scheme, will not infer fraud on the part of the defendant, and consequent injury to the complainant. *M. & C. R. R. Co.* v. *Neighbors,* 51 Miss., 412; *Watts* v. *Patton,* 66 Miss., 54 (5 South., 628); *McInnis* v. *Wicassett Mills,* 78 Miss., 52 (28 South., 725).

In the bill of complaint in the instant case, there is no compliance with the rule of equity pleading announced. While many vague, uncertain, and indefinite charges of a general character are made, averring that in the entire course of business between complainants and the defendant the defendant was actuated by a corrupt and fraudulent design, no specific fraudulent acts

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are set out with that distinctness and certainty which is demanded in charges imputing fraud, nor is it shown in any manner that the complainants were by this course of dealing wronged or injured. While the allegations were so vague as to scarce require a denial, the record discloses that appellant filed an answer expressly denying all fraud on his part. True it is that the denial is in broad and general terms, but the bill of complaint charged the fraudulent conduct in such an uncertain way as to furnish the defendant no definite information whereby he could make his denial any more specific. With the charge of fraud answered and properly denied, the bill of complaint states no facts showing that complainants were injured or suffered any such wrong as would authorize a court of equity to grant the relief prayed for. More than this, conceding as true all the well-pleaded and relevant facts, the bill of complaint affirmatively shows such a state of case as would prevent the complainants from obtaining relief in the manner they seek. The bill admits that the land in question was sold in a strictly legal manner, under a perfectly valid trust deed, for the collection of an indebtedness acknowledged to be just, true, correct, and past due. It further appears that complainants were advised of this sale in ample time, had they so desired, to have invoked the aid of a court of chancery to prevent the sale, had there been any valid objection thereto, but that, acting on the advice of their attorney, they decided to permit the sale to proceed, intending to institute suits in reference to the subject-matter thereafter. The bill, it is true, does aver that the mortgagee did not desire to foreclose its lien at that time, and that the foreclosure sale was the result of a conspiracy between the substituted trustee and the appellant, who was a junior mortgagee of the property; but this charge cannot avail, for the reason that the written appointment of the substituted trustee, which appears as an exhibit to the bill of complaint, distinctly states that the said mortgagee—the British & American Mortgage Company—"does now, moreover, request and direct that

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he will forthwith proceed to execute the trust therein contained." Under this appointment and direction the substituted trustee was not only empowered, but it became his imperative duty, to make the sale of the property under the trust deed, which appellees in their bill of complaint confess had been defaulted and the entire indebtedness secured thereby justly due by them. Nor does the bill of complaint state any fact which justifies the intimation that the substituted trustee was guilty of any wrongful act towards the complainants or was guilty of any oppression or disregard of their rights. The fact that he refused to receive the interest and postpone the sale of the land was in accordance with his duty toward the mortgagee, by whom he had been substituted as trustee, and, so far as this record shows, he was clothed with no authority at the time the money was tendered to exercise any discretion or to act in any manner other than as he was specifically directed by the letter of his appointment. The entire indebtedness under the terms of the trust deed was due and collectible, and the expense incident to the preparation of the necessary papers and the advertisement of the proposed sale had already been entailed. Under such circumstances, and at such a time, it would have been a willful and deliberate disregard of duty on the part of the substituted trustee to have acted in a manner otherwise than he did. Nor would it avail the appellees aught, assuming it to be true that both the appellant and the substituted trustee intended, in making the sale, to thereby further the interest of the appellant. The law cannot concern itself with the motives of parties when their acts are legal and violate no principle of right. As was said by the supreme court of the United States in the case of *Dickerman* v. *Northern Trust Co.*, 20 Sup. Ct., 311 (44 L. ed., 435): "If the law concerned itself with the motives of parties, new complications would be introduced into suits which might seriously obscure their real merits. If the debt secured by a mortgage be justly due, it is no defense to a foreclosure that the mortgagee was animated by hostility or other bad motive. *Davis* v. *Flagg*,

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35 N. J. Eq., 491; *Dering* v. *Winchelsea,* 1 Cox, Ch. Cas., 318; *McMullen* v. *Ritchie* (C. C.), 64 Fed., 253, 261; *Toler* v. *East Tennessee, V. & G. R. Co.* (C. C.), 67 Fed., 168.

In this case the bill shows affirmatively that the mortgage was legal, that the debt secured thereby was due, and that the complainants, acting under legal advice, decided to make no further payment on the first mortgage debt, and voluntarily refrained from making any effort to prevent the sale for the satisfaction thereof; and there is neither averment nor proof that the mortgagee was influenced by any other motive than a desire to collect the money due. To disturb a sale made under such circumstances because of the fact that the substituted trustee and a junior mortgagee expected or intended to profit thereby would be an unwarranted extension of the legal principles applicable to such cases. From this view it is not material whether the junior mortgage was in fact for a just and legal indebtedness or not. Appellant purchased at a foreclosure of a senior mortgage at a sale regularly and legally held, and appellees cannot now set aside this sale for the purpose solely of having the property resold, with the bare hope that it might realize more than is justly owing thereon. We are unable to see from the facts disclosed by the bill of complaint how the fact that a junior mortgage rested on the property at the time of the sale could in any manner have prejudiced the rights of appellees. Whether fraudulent in whole or in part, it could in no legal way have deterred bidders, for the reason that the purchaser under a senior mortgage sale takes to the exclusion of all junior incumbrances. The bill of complaint shows no cause of action which would authorize a court of chancery to set aside the sale of the land under the circumstances detailed, and the demurrer should have been sustained.

Wherefore the decree is reversed, the demurrer sustained, and the case remanded, with leave to amend within sixty days from filing of mandate in court below.

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Statement of the case.

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RICHARD S. WEIR *v.* ANN J. JONES ET AL.

1. SUPREME COURT PRACTICE. *Transcript. Exhibits to bill in equity. Recitals.*

Where an original bill in equity made a deed from a substituted trustee in a deed of trust an exhibit thereto and a part thereof, and the deed so exhibited made the instrument appointing the substituted trustee a part of itself, and the same was copied into the transcript, it became on appeal a part of the record in the supreme court, although an amended bill was filed in the case which simply referred to the deed and did not make it an exhibit to the bill as amended.

2. SAME. *Res adjudicata.*

Where, in a suit to set aside a trust deed, the court, on appeal, in its opinion referred to an instrument appointing a substituted trustee, but no question as to the validity of the appointment was passed on, there was no ground for striking such reference from the opinion, on the idea that it might preclude complainant on the next trial from attacking the validity of the appointment.

FROM the chancery court of, second district, Carroll county. HON. ADAM M. BYRD, Chancellor.

After the decision of this case in the supreme court (see *Weir* v. *Jones*, ante p. 602), the appellees made a motion in these words:

"Appellees move the court to strike from the record herein the paper purporting to be the appointment of J. N. Flowers as substituted trustee, appearing on pp. 49 and 50 of the transcript, and also to strike from the opinion herein (36 South., 533) all reference to said paper, or at least so much of the opinion as recites and states that said paper is an exhibit to the bill of complaint, for the following reasons:

"(1) Said paper is not an exhibit to the bill or a part of the record, and appellees show that the same was copied in the transcript by the clerk of the court below at the request of counsel for appellant; this being done without authority, said paper not being a part of the record in the court below or this court.

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Opinion of the court.

"(2) It is the purpose of appellees, under leave granted, to amend the bill of complaint so as to charge, among other things, that the said alleged appointment of the trustee was and is void, thereby rendering the sale of the land invalid; and if the said paper remains in the record, and the reference thereto in the opinion remains in the record after the adjournment of this court, appellees fear that it will be held or claimed that the validity of said appointment is *res judicata.*

"(3) It is evident that the reference to the said appointment in the opinion was inadvertently made, upon the supposition that said paper was a part of the record, and, since this is not true in point of fact, appellees protest against the statement in the opinion that said paper was an exhibit to the bill or a part of the record in this cause."

Brame & Brame, and *J. S. Smith,* for the motion.

J. N. Flowers, and *Alexander & Alexander,* contra.

OPINION OF THE COURT ON THE MOTION.

PER CURIAM. On page 10 of this record the deed from the substituted trustee to the appellant is expressly referred to, and a copy thereof, in the language of the original bill of complaint, "is hereto attached as Exhibit 'D' to this bill, and the same may also be found of record in deed book No. 14, on p. 325 *et seq.*" That deed is copied into and forms part of this record, and by its express language makes the instrument appointing the substituted trustee a part of the deed of conveyance. This deed and appointment is not again copied as an exhibit to the amended bill, but, nevertheless, it is therein referred to again, and constitutes a part of the record presented to the court for its consideration. While this is true, there is nothing in the opinion which precludes the appellees, upon filing their amended bill, from setting up any and all grounds which they may have, attacking either the validity of the appointment of the substi-

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Syllabus.

tuted trustee or the sale made by him by virtue of such appointment. These questions are in no wise passed upon in the original opinion, which will stand as written.

Motion denied.

JOHN R. MOORE ET AL. *v.* ROWLAND A. CRUMP, JR., ET AL.

1. TRUSTS. *Obtaining conveyance by fraud. Statute of frauds. Code* 1892, § 4230. *Parol evidence. Sufficiency of evidence.*

A trust, not within the statute of frauds (Code 1892, § 4230), and which may be established by parol, will be raised in favor of a party to whom land was intended to be granted or devised, if another by actual fraud obtains the legal title thereto; but the trust can be established only upon clear and convincing proof of the fraud.

2. SAME. *Facts examined.*

Facts examined and adjudged not to make out a case within the rule above stated.

3. SAME. *Witnesses. Estate of decedent. Code* 1892, § 1740.

Witnesses are incompetent to testify to establish their own claims against the estate of a decedent, under Code 1892, § 1740, so providing.

4. SAME. *Statute of limitations. Adverse possession. Code* 1892, §§ 2730, 2731, 2734. *Equity. Reformation.*

Where a grantor owned only the north half of a section of land and, intending to convey it, by error conveyed the west half and the grantee took actual possession of the land intended to be conveyed:

(*a*) The grantor and those holding under him will be barred of all claim to the land intended to be but not actually conveyed after the expiration of ten years from the beginning of such possession; and

(*b*) Equity would, on proper application, reform the deed so as to make it convey the land intended to be conveyed.

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Brief for appellants.

5. SAME. *Chancery practice. Cross-bill. Prayer for general relief. Reformation granted.*

Where a cross-bill based on a mistake in a deed concluded with a prayer for general relief, the chancellor should have decreed that the cross-complainants were, as to the cross-defendants, the owners of the property in question, where the proof showed such to be the case, although the cross-bill did not seek the reformation of the deed.

FROM the chancery court of Lowndes county.

HON. JAMES F. MCCOOL, Chancellor.

Crump and others, appellees, were complainants, and Moore and others, appellants, defendants in the court below. From a decree in complainants' favor the defendants appealed to the supreme court.

The facts are fully stated in the opinion of the court.

William Baldwin, and *C. L. Lincoln,* for appellants.

The bill on its face makes out no case, and is directly in the teeth of the statute of frauds.

If there be any principle of law settled beyond all controversy, it is that a trust growing out of a parol agreement is absolutely void.

The averments of the bill in this cause are that R. A. Crump, being financially embarrassed, "agreed" with Mrs. Bryan that Smith should convey her the lands, and she was to hold them and divide them in equal parts between herself and his other children. The bill does not state that Crump furnished any of the money to buy the lands, simply "an agreement" to buy and hold them in trust. The cases of *Miazza* v. *Yerger,* 53 Miss., 139, and *Robinson* v. *Leflore,* 59 Miss., 150, are clear and distinctive expressions of the statute of frauds, as applied to agreements of the character named in this bill.

If the bill on its face sets out any case, all the facts constituting any semblance of equity in it are entirely removed by the testimony of appellees' own witness, C. R. Smith, whom they will not be permitted to impeach or deny.

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Brief for appellees.

The facts are few and simple—to wit: R. A. Crump's lands had been sold at trustee's sale and purchased by witness. Crump hoped to be able to buy these lands back, and he and witness had an understanding that if Crump would pay to witness what he (witness) had paid for the lands and ten per cent interest on the money, witness would sell the lands back to him (Crump). Thereafter Crump went to witness and told him to use the language of the witness: "Then some time afterwards, I do not remember how long exactly, Mr. Crump came to me and stated that he had not the money to buy the property back, but his daughter, Mrs. Bryan, did have the money, and asked me would I convey the property to her, as he did not think that he would ever be able to redeem it. I told him I would by her paying me ten per cent interest on the money I had invested in the property, which she did do, and I conveyed her the property."

The open, notorious, continuous, adverse possession of Mrs. Bryan from 1889 to the filing of this bill in 1902, a period of more than ten years, is a perfect defense.

If the transaction was a fraud on the creditors of Crump, and wanting in consideration paid for it, his (Crump's) heirs and representatives are bound by it, and it does not lie in their mouth to say that it was fraudulent. *Shaw* v. *Millsaps,* 50 Miss., 380; *Partee* v. *Mathews,* 53 Miss., 142; *Day* v. *Davis,* 64 Miss., 253; *Martin* v. *Tillman,* 70 Miss., 614. As to the error or misdescription in the lands owned by Willie Bryan, and sought to be corrected in his cross-bill, the decree appealed from never disposes of it at all, ignores it and the cross-bill altogether.

Newman Cayce, for appellees.

The evidence amply and fully sustains the findings of the chancellor upon all the averments of the bill, that complainants and defendants are tenants in common, as to all the lands de-

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scribed in the bill, and were of right entitled to the relief prayed.

This proceeding is not in purpose or effect attacking the validity of the deed made by C. R. Smith to Mrs. Mattie R. Bryan, conveying the land purchased by him from E. G. Smith, trustee, but only to show the conditions and circumstances under and by which Mrs. Bryan received and held the land during her lifetime, and these conditions and circumstances shown by the evidence establish beyond question that the deed was received by her under conditions and circumstances out of which arises an implied constructive trust by operation of law for the benefit of her brother and sister, the enforcement of which constructive trust the clearest principles of equity and justice demand. It is not an express trust, but a constructive trust, arising out of the fact that Mrs. Bryan, by promising her father to hold the lands for the benefit of herself and her brother and sister, was enabled to obtain the deed thereto. Beyond all doubt but for this promise the deed would never have been made to her, founded as it must have been upon the confidence of the father in the daughter complying therewith. Where the promise is made between the father and child the moral obligation is strengthened by the existing relation and the confidence which the one would naturally repose in the other.

The statute of frauds, § 4230, Code 1892, to which defendants appeal in their effort to withhold from their co-heir their proportion of the common property of their ancestor, has no application, except that the section expressly provides that a trust like this "shall be of the like force and effect, as if this statute had not been passed." The statute of frauds is for the purpose of preventing frauds, not for the purpose of upholding and consummating them.

Constructive trusts are such as are raised by equity in respect to property which has been acquired by fraud, or where originally acquired without fraud. It is against equity that it

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should be retained by him who holds the legal title. Where real estate is conveyed with an express or implied agreement that it shall be held for the use of a third person, equity will fasten a trust on the conscience of the trustee. If a grantee or devisee obtain a deed or devise to land by means of promises to hold the land for another, this is sufficient to raise a trust in favor of the latter on the ground of fraud, and this may be proved by parol. 2 Washburn on Real Property (3d ed.), 447, 451; 1 White & Tudor's Leading Cases in Equity (4th ed.), 432; *Ransdell* v. *Moore,* 153 Ind., 393 (s. c., 53 R. L. A., 753); *Ragsdale* v. *Ragsdale,* 68 Miss., 92.

HARRIS, Special Judge,* delivered the opinion of the court.

The facts of this case, briefly stated, are as follows: One R. A. Crump, Sr., in his lifetime, was the owner of certain real estate in Lowndes county, Miss., consisting of houses and lots in the town of Artesia, and certain country property. He had been engaged in the mercantile business, and became heavily embarrassed financially, and in 1887 executed a deed of trust on the property in controversy in this suit to secure J. L. Smith an indebtedness of about $2,700. Shortly before the death of R. A. Crump, Sr. (about two years), which occurred in November, 1889, finding himself hopelessly involved financially, the property in question was sold under the trust deed, and purchased by C. R. Smith, who was a friend of, and had business dealings with, R. A. Crump, Sr. R. A. Crump, Sr., represented to C. R. Smith his condition; told him he would be unable to redeem the property, but stated to Smith that his daughter and oldest child, Mrs. Mattie Bryan, had money, and would purchase the property, and Smith agreed to let Mrs. Bryan have the property, she to pay the amount, with 10 per cent interest. A conveyance was shortly afterwards made by C. R. Smith to Mrs. Bryan. As above stated, R. A. Crump,

* Chief Justice Whitfield, being disqualified, recused himself, and J. B. Harris, Esq., a member of the supreme court bar, was appointed in his place and presided as such.

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Sr., died in 1889. Mrs. Bryan died in 1896, leaving surviving her Willie Bryan, a minor, Ruby Bryan (now Mrs. Noffsinger), and her second husband, J. R. Moore. Besides Mrs. Bryan, Mr. Crump, Sr., left surviving him two other children —Roland A. Crump, Jr., and Mrs. Annie M. Gladley. On the 31st day of March, 1902, six years after the death of Mrs. Bryan, and about thirteen years after the death of R. A. Crump, Sr., R. A. Crump, Jr., and Mrs. Annie Gladley filed a bill in the chancery court of Lowndes county, making J. R. Moore, Mrs. Noffsinger, Willie Bryan, Gaius Whitfield, and others parties defendant; alleging that the conveyance of the property in controversy by J. R. Smith to Mrs. Bryan was with the understanding that it was to be held by her for the benefit of herself and the other children of R. A. Crump, Sr.; that R. A. Crump, Sr., being insolvent, and wishing to save this property for his children, had entered into a scheme by which the title to the property was put in Smith, and then from Smith conveyed to Mrs. Bryan, to be held by her for the benefit of herself and the two complainants; and the bill prayed that the complainants be declared tenants in common of the property with the heirs of Mrs. Bryan, each entitled to a one-third undivided interest therein, and that the land be sold for division, and that an accounting be taken, etc. A separate answer was filed by J. R. Moore and Mrs. Ruby Noffsinger, denying all of the allegations of the bill in regard to the trust; alleging that the property was purchased in good faith by Mrs. Bryan; that she entered into possession, open and notorious, claiming the same as her property up until the time of her death, and that after her death the respondents, together with Willie Bryan, had been in possession of the same, receiving the rents and profits of the same, without question; that Mrs. Bryan during her lifetime had made valuable improvements on some of the property in Artesia, a storehouse on one of the lots having burned and having been rebuilt by Mrs. Bryan at considerable

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expense; that during her lifetime Mrs. Bryan had used and disposed of the property as her own. A separate answer and cross-bill was filed on behalf of Willie Bryan. He adopted the answer of J. R. Moore and Mrs. Noffsinger, but alleged that in the execution of the deed of trust by R. A. Crump, Sr., to J. L. M. Smith, by mistake he had conveyed the west half of section 18, township 18, range 16 east, whereas in fact he should have conveyed and intended to convey the north half of section 18, township 18, range 16 east; that R. A. Crump, Sr., did not own the west half of said section, but did own the north half, and that he intended to convey that; that the same mistake occurred in the deed made by C. R. Smith to Mrs. Bryan, but that Mrs. Bryan had taken possession of the north half of said section, making no claim whatever to the southwest quarter of said section. The cross-bill sets up further that there was a partition proceeding after the death of Mrs. Bryan, and that the cross-complainant had become the purchaser of the north half of section 18, or, in other words, of 240 acres in the north half; that it was the intention of R. A. Crump, Sr., to convey the north half; that all parties supposed he had conveyed the north half; that Mrs. Bryan had taken possession of the north half; and that the cross-complainant had also, after his purchase, taken possession of the north half, openly and notoriously, for more than ten years. He therefore prayed that the original complainants and his co-defendants be made parties defendant to his cross-bill, and their claim to an interest in the said north half—or, more exactly, the northeast quarter and the east half of the northwest quarter of section 18, range 16 east (a portion of this half section having been sold in the lifetime of R. A. Crump, Sr.)—be canceled as a cloud upon his title, and for general relief. The cross-bill was answered by the original complainants, but was not answered by the other defendants. Proof was taken, and a decree was rendered in accordance with the prayer of the original bill, and from that

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decree the heirs of Mrs. Bryan and present possessors of the property appealed to this court.

It may be said, in passing, that the suit was dismissed as to Gaius Whitfield. There had been a partition proceeding, as above set forth, after the death of Mrs. Bryan—the property being sold—and Gaius Whitfield was the purchaser of a piece of the property at this sale.

We have given the case repeated and most painstaking investigation, and the result of our deliberation is that the decree of the chancellor must be reversed.

The evidence by which it was attempted to establish the trust, with the exception of one immaterial and unimportant particular, was by parol. The complainants (appellees here) invoke the well-established and well-recognized doctrine that, where a grantee or devisee obtains the possession and title to land intended for another by actual fraud, on proof of the fraud a trust will be raised in favor of the latter, and that the trust may be established by parol. The doctrine finds its most frequent illustration and application in the case of devisees preventing a testator from making intended provision by will for another, and like cases. The doctrine is clearly set forth in the familiar case of *Ragsdale* v. *Ragsdale,* 68 Miss., 92 (8 South., 315; 11 L. R. A., 316; 24 Am. St. Rep., 256). Judge Campbell, delivering the opinion of the court, says: "There is no dissent from the proposition that one who is active in preventing a testator from making an intended provision by his will for another, and where, but for such intervention, the intended provision would have been made, will be held to be trustee of any devise to himself, to the extent it would have been for such other if it had not been intercepted by him, and will be compelled to respond to the claim of the intended beneficiary. Intercepting a bounty intended for another, and diverting it to one's self, is held to be fraud, from which a trust arises by operation of law, and not within the statutes of frauds

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of wills, but expressly excepted." The court continues: "We would not be understood as sanctioning the doctrine that an enforceable trust will arise from the mere breach of an oral promise, however solemn, to hold land in trust. There must be conduct influential in producing the result, and but for which such result would not have occurred—amounting, in view of a court of equity, to fraud—to save the case from the statute of frauds. A merely oral promise, and its subsequent breach, however disappointing and harmful, and though ever so reprehensible in morals, is not of itself enough to cause a court of chancery to declare a trust.". Counsel for the appellees base their contention upon the doctrine set out in the Ragsdale case and kindred cases. We fully approve the doctrine. But the proof in the case at bar falls very far short of bringing the case within it. Under the authorities, not only must there be actual fraud on the part of the party sought to be held as trustee, but there must be clear and convincing proof of this fraud. There is absolutely no evidence in this record of any fraudulent conduct on the part of Mrs. Bryan whatever—no proof of any conduct on her part intended to mislead or to deceive any one, or to obstruct in any way the carrying out of any intention on the part of R. A. Crump, Sr., in favor of the appellees. This was not a deathbed transaction. The transfer of the property to Mrs. Bryan occurred two years before the death of Mr. Crump, and the evidence is that Mrs. Bryan was in possession of it, controlling it and using it as her own, and that Mr. Crump spoke of it as belonging to Mrs. Bryan.

But the case must fall under the proof which is made by the complainants' own witnesses. The first testimony offered was that of C. B. Smith, who was the only living witness to the transaction. He testified that he bought the property at the trustee's sale, in perfect good faith, as an investment, without any understanding whatever that he was to hold the title for the benefit of Mr. Crump or that it was to be held for the ben-

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efit of the children of Mr. Crump. He testified that Mr. Crump had asked to be allowed to redeem, and that he had agreed to allow Mr. Crump to take the property for what he (Smith) had paid for it, upon Crump paying him the purchase price, with 10 per cent interest; that afterwards Crump came to him and told him that he was unable to take the property, and that he was so much embarrassed he saw he would not be able to pay it, and asked if he would let Mrs. Bryan have it upon the same terms that he (Smith) had agreed to let Crump have it. Smith told him that he would do this, and afterwards the deed was made to Mrs. Bryan, and the money was paid by her, and he recognized her as being the owner, and nothing was said about anybody else having an interest in the property. This was the proof offered by the complainants themselves—the testimony of the only living witness to the transaction.

In addition to this, the chancellor admitted—we think, erroneously—the testimony of the complainants. The admission of this testimony was objected to upon the ground that it was incompetent, as it was the testimony of parties to establish their own claim against the estate of a deceased person, which arose in the lifetime of the deceased. However, although this testimony should have been excluded, it does not make out a case of fraud. On the contrary, Roland A. Crump, Jr., testified that Mrs. Bryan let her father have $1,400 for the purpose of paying this very debt. In addition to this, it is shown that Mrs. Bryan did have the money, derived from several sources. Her bank book was offered in evidence, showing she had $1,300 in the bank, which she had drawn out at the time of this transaction. Various witnesses were introduced, all of whom testified that Mrs. Bryan was looked upon as the owner of this property. She was in possession of it, managing and controlling it. Thomas Grant, who was a tenant on the country property, testified that Mrs. Bryan owned the property; that he had been in the habit of getting rations from Mrs. Crump, but a short time be-

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fore Mr. Crump's death he came in to get his rations, and Mr. Crump told him that Mrs. Bryan owned the property; and he says he got rations from Mrs. Bryan. There is absolutely nothing in the record which tends to show fraud on the part of Mrs. Bryan. The chancellor did admit, as we have above stated, erroneously, the testimony of the complainants; and they testified that Mrs. Bryan had during her lifetime given them certain sums of money, which they understood to be part of their share of the rents from the property. This testimony, however, was wholly inadmissible, and, even if admissible, is very far from satisfying the court of any actual fraud on the part of Mrs. Bryan, or of any proof of any intention on the part of Mr. Crump to put the title of the property in her name for the benefit of the complainants. The idea of the complainants seems to be that the transaction was simulated, and that no money was passed; whereas, as a matter of fact, it is shown that Mrs. Bryan's money was actually used for the purchase of the property, and the title taken in her name. Again, it is shown by the testimony of Mr. Gladley, the husband of one of the complainants, that he actually collected rents from this property and turned it over to Mr. Lincoln, the guardian of Willie Bryan, and neither he nor his wife ever made any claim for any of these rents in any way. Mrs. Bryan entered into the possession of the property twelve or fourteen years before the bill was filed. Some of the improvements were burned, and rebuilt by her at a considerable expense; she paid the taxes; and her title seems never to have been questioned by anybody until this bill was filed, six years after her death. There is some vague testimony as to the statements and hints thrown out by Mr. Smith, all of which he denies, but, even if undenied, they would not be sufficient to establish the claim of the complainants. But this testimony by the complainants, on their own behalf, to establish their claim against the estate of Mrs. Bryan, deceased, as before said, was wholly inadmissible.

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Opinion of the court.

In regard to the claim set up in behalf of Willie Bryan, in his cross-bill, to the northeast quarter and the east half of the northwest quarter of section 18, township 18, range 16 east, we are of the opinion that, on the facts disclosed by the record, he is entitled to relief. The record shows that R. A. Crump, Sr., purchased the north half of said section from one Connelly, and went into the possession of it; that, when he executed the trust deed to Smith, he undertook to convey the 320 acres, but, by mistake, instead of writing in the deed of trust the "north half," the "west half" was written; and that the trustees, in conveying to C. R. Smith, the purchaser under the trust deed, conveyed to him the west half; and that C. R. Smith conveyed the west half to Mrs. Bryan. Mrs. Bryan, however, took possession of the north half. It is shown that Mr. R. A. Crump, Sr., owned no other lands in section 18, except the north half, and that Mrs. Bryan, under her sale, took possession of the north half; and the record also shows that, when the partition proceedings were had between the heirs of Mrs. Bryan, Willie Bryan actually bought, and took a deed from the commissioner to, the north half, less 80 acres which had been sold previously to Walter Fox. So the cross-complainant and those under whom he claimed had been in actual possession, claiming this north half, for more than ten years before the original bill in this case was filed.

We are of the opinion that, under the facts disclosed by the transcript, the defendants to the cross-bill are barred as to any claim that they might have had to any interest in the north half of said section. Had they asserted their claim at any time within the statutory period, under the facts disclosed in this record, we think, manifestly, a court of equity would have reformed the instruments purporting to convey the west half, and carried out the intention of the parties, but no such claim was asserted. Although the cross-bill is not a bill seeking the reformation of the deeds, it does conclude with a prayer for

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Syllabus.

general relief; and, under that prayer for general relief, the court below should have decreed that the claim of the defendants to the cross-bill was barred, and that Willie Bryan, cross-complainant, was, as to them, the owner of the property.

Our conclusion is that the decree of the chancellor be reversed, and a decree entered here dismissing the original bill, and, further, declaring the claim of Roland A. Crump, Jr., Mrs. Annie M. Gladley, J. R. Moore, and Mrs. Ruby Noffsinger, defendants to the cross-bill, forever barred as to the northeast quarter and the east half of the northwest quarter of section 18, township 18, range 16 east.

Reversed, and decree here.

MARY R. MILES ET AL. v. THEUS N. MILES ET AL.

1. DEEDS. *Description. Name of tract. Reformation. Evidence.*

A deed to a plantation describing the same by its well-known name, although reciting that it consisted of certain lands designated by government survey descriptions, aided by proof that the grantee, with the knowledge and consent of the grantor, entered into the possession of the lands which had previously passed as a part of the plantation, warrants the conclusion that the grantor intended to convey all of said lands and may be reformed so as to specifically include a part thereof not described therein by survey descriptions.

2. SAME. *Intentional use of mistaken terms.*

The description of land in a deed may be reformed so as to embrace the tract sought to be conveyed, although the parties intentionally used the terms of description as written in the deed, if they did so under the mistaken impression that they properly described the tract.

3. SAME. *Consideration. Volunteers.*

The grantees in a deed, supported in part by a valuable consideration, are not mere volunteers, and are not precluded from hav-

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Statement of the case.

ing the deed reformed, although the entire consideration may not have been a valuable one.

4. SAME. *Concrete case.*

Where a deed from a grantor to his son was a part of the transaction by which a family settlement was arranged and perfected, and the purchase by such son of his brother's interest was a part of the consideration moving the grantor to divide the property, a court of equity will reform the deed to effectuate the intention of the parties, as they occupied the position of persons who had inherited the property, undertaken to divide it, and a mutual mistake had occurred.

FROM the chancery court of Holmes county.

HON. ADAM M. BYRD, Chancellor.

Theus N. Miles and others, appellees, were complainants in the court below; Mary R. Miles and others, appellants, were defendants there. From a decree in complainants' favor the defendants appealed to the supreme court.

This suit began by an original bill to reform a deed to appellees, executed July 1, 1897, by Gen. W. R. Miles, to certain lands and personalty—lands described by sectional numbers, constituting, as declared by the deed, the Quofoloma and Omega plantations—by adding to the sectional numbers used in the deed all of section 33 within the curvature of Horseshoe Lake, containing 110 acres, upon the claim that it was a part of Quofoloma. Besides reformation, perpetual injunction was asked against appellant, Mrs. Mary R. Miles, to whom Gen. William R. Miles, by will, had devised, along with other property, the Good Hope plantation, in consideration of $25,000 obtained by him from her in 1895; the Good Hope plantation, as recited in the will, consisting of all of section 33 and other lands. Gen. Miles on July 1, 1897, was eighty years old, and the owner of four good delta plantations, named "Good Hope," on which he had resided, with appellant, his wife, for thirty years; "Mileston," "Quofoloma," and "Omega." The latter two lay west of Good Hope, which separated them from

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Statement of the case.

Mileston. By a former marriage Gen. Miles had two sons—Theus N. Miles, who had a wife and three children; and Edward H. Miles, a bachelor; all of whom lived in Louisiana, and were then visiting Gen. Miles. During their visit a present gift of all the sons were ever to receive from their father's estate was discussed and settled. Before that visit Theus N. Miles, by an extensive correspondence, had tried to purchase from Edward H. Miles whatever property his father should allot to him. After full discussion, Gen. Miles intended to give Omega to Edward H. Miles and Quofoloma to appellees, Theus N. Miles and his wife, for life, with remainder to their children. Thereupon, in consideration of $10,000 in notes of Theus N. Miles, secured by a vendor's lien, Edward H. Miles executed to appellees a deed to all his interest in his father's estate, not specifying its nature, after which Gen. Miles executed a deed to appellees to certain lands, not including any of section 33, declared to constitute the Omega and Quofoloma plantations—the deed in controversy—its preamble reciting that Theus N. Miles had purchased the interest of Edward H. Miles. The deed declared it was all that either would receive, and based the consideration on love and affection. On December 6, 1875, Gen. Miles executed a deed to Theus N. Miles to a half interest in lands—the other half interest being then sold for $30,000—in which deed, signed by both, were recitals that Theus N. Miles had previously received $18,000 as advancements, and was to have nothing more from his father's estate than the land then conveyed. Gen. Miles, after having been financially involved for a long time, in February, 1895, with $25,000 borrowed from appellant, Mary R. Miles, proceeds of her mother's estate, discharged the last incumbrance on his property. In consideration of the $25,000, he then signed, acknowledged, and delivered to appellant, Mary R. Miles, a deed to the Quofoloma plantation, which she retained, but did not file for record. On July 7, 1897, Gen. Miles made his last

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will, devising to appellant, Mary R. Miles, all property he had reserved, including Good Hope plantation, consisting of lands embracing all of section 33. He died January 1, 1900. After his death, Theus N. Miles having paid none of the purchase-money notes, amounting to $10,000, Edward H. Miles instituted suit in the chancery court of Holmes county to enforce his vendor's lien notes against appellees and the Quofoloma plantation, alleging that Gen. Miles had determined to deed him Omega, which was the share of Gen. Miles' estate intended to be described in the deed to appellees from Edward H. Miles, and for which the notes were given, and that for the Omega plantation, afterwards, on account of this deed, conveyed by Gen. Miles to appellees, Edward H. Miles was the vendor, and Gen. Miles the grantor. A demurrer to this bill was sustained in the chancery court upon the ground that the deed was a nullity. This decree was reversed by the supreme court. Reported, *Miles* v. *Miles*, 78 Miss., 904 (30 South., 2). After this reversal the case was tried, the bill sustained, and decree entered against Omega for the purchase money. These proceedings were in evidence in this case.

In 1900 appellant, Mary R. Miles, leased the Good Hope plantation to one Thompson, who instituted an action of ejectment against appellees for the 110 acres of section 33 within the Horseshoe. Appellees instituted this suit to reform their deed of July 1st, and to enjoin appellant and all others from claiming that land under the last will of Gen. Miles. The bill alleged that the plantations were always known, managed, and dealt with by plantation names, and were so platted on Gen. Miles' plantation map; that Gen. Miles and Theus N. Miles believed until the survey was made in December, 1899, that the west boundary line of section 33 ran east of the land within the Horseshoe, and all of that land to be in section 32, and that, while he did intend to reserve section 33, they did not know any part of it was within the Horseshoe, and that the deed

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sought to be reformed and the will were all parts of one transaction, by which two plantations were to go to his sons—Quofoloma and Omega—and the other two were to be retained by Gen. Miles, and devised to appellant, Mary R. Miles, as was done. Appellant, Mary R. Miles, in her answer, denied that any part of section 33 ever constituted any part of Quofoloma; that the plantations were well known by boundaries, always operated or disposed of, or were ever so platted; alleging the boundaries were indefinite, often changed; and that, in all of the numerous conveyances and incumbrances of Quofoloma by Gen. Miles, it had never been given the same boundaries or contents twice alike, and never embracing any part of section 33, all of which section had always been included in the descriptions of Good Hope plantation, taxes having always been paid upon the whole of it as part of Good Hope, to the present time; alleging further that Gen. Miles had intended Omega for Edward H. Miles, who intended that plantation as the property conveyed by him to appellees; that, on account of this deed, Gen. Miles conveyed it with Quofoloma, originally intended for appellees; that appellant had advanced $25,000 in February, 1895, to Gen. Miles, and received and held an unrecorded deed to Quofoloma; and that prior to 1897 Theus N. Miles had received all of his father's estate ever intended for him, and so acknowledged in a recorded deed executed in December, 1895. Appellees introduced several negroes who had long lived on the plantation, and three white men who had formerly been managers, to show that the land in the Horseshoe was treated and considered a part of Quofoloma. To the same effect several white men as well as Theus N. and Edward H. Miles testified. The managers stated that for many years the manager of Quofoloma would manage a part of Good Hope or Omega. A surveyor testified that the section line between sections 31 and 32 across Horseshoe had never been run until December, 1899, though it appeared upon the county map, and the plantation map of General Miles, which he often consulted,

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Statement of the case.

showed that about 110 acres of cleared land in section 33 were within the Horseshoe, which was an impassable brake, about a quarter of a mile wide, in section 33. The entrance to the land in the Horseshoe was on the west side, partly on section 29, which belonged to Omega, and partly on section 32, belonging to Quofoloma. Theus N. Miles admitted in his deposition that at the time of the execution of the deed, both he and General Miles knew that a part of the land in section 33 was within the curvature of the Horseshoe, but that General Miles declined to put any of section 33 in the deed, stating that only about ten acres was within the Horseshoe, and that appellees would not be troubled. On behalf of appellant it was proven by deeds and deeds of trust that, from before the civil war until now, every conveyance and incumbrance of Good Hope had all of section 33, and that no conveyance or incumbrance of Quofoloma (and a number of them were introduced) ever included any part of section 33. General Miles' map, put in evidence, showed that there were no boundaries fixed between his different plantations, and nothing showing what constituted each, other than marginal notations giving the quantity of cleared land of each, and that the cleared land accorded to Quofoloma was fully made up from that contained in the sectional numbers embraced in the deed in controversy, and that, without the 110 acres of cleared land within the curvature of the Horseshoe, the cleared lands assigned to Good Hope could not be made up, being short to that extent. It was also proved that not until surveys made after General Miles' death were the boundaries between Good Hope, Quofoloma, and Omega, north and south of Horseshoe, known, and that lands were worked until this survey, by appellant deeded to appellees, and by appellees that were devised to appellant. It was shown that the lands within the Horseshoe had nearly all been cleared by a tenant who lived in the Horseshoe, and to whom the lands were leased for fifteen years by the name of the "Horseshoe Tract." By negroes who had lived on the

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Brief for appellants.

places, and by a physician who lived on adjoining land, and who had practiced on the plantation since before the civil war, it was proved that there were no generally known lines between the plantations, and that they had regarded the lands within the Horseshoe as a separate tract. No witness on either side could give the boundaries of any plantation. Appellant, Mary R. Miles, testified that General Miles knew he had reserved from the deed to appellees a part of the land within the Horseshoe, and so stated to Theus N. Miles in her presence, at her table, about the time appellees went into possession of the land in controversy, and that General Miles knew only approximately where the lines between the plantations ran; that some hands on each plantation worked some land on the other plantations; and that pending a survey each worked some of the lands owned by the other. Theus N. Miles did not deny the conversation, and testified that no improvements were put by him on the land in controversy, but extensive improvements were put on the other property, and that after the survey of December, 1899, General Miles told him he would convey him the land within the curvature of the Horseshoe in section 33, but died shortly afterwards. Witnesses testified to General Miles claiming the land within the Horseshoe after the deed to appellees; and a priest, nephew of General Miles, whom General Miles had educated, testified that he was present when the deeds were discussed and drawn, and that the plantation maps were consulted then, and deeds drawn with reference to them. These facts and his presence were denied by Theus N. and Edward H. Miles. All the evidence of Theus N. Miles was objected to as being incompetent under the statutes prohibiting parties from testifying to establish their own claims against the estates of decedents, and was in part excluded.

Noel, Pepper & Elmore, for appellants.

If the plantation names are to be accepted as the boundaries, then the records furnish a constantly varying description, and

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Brief for appellants.

no living man could be found who could locate by any writing the plantation of Quofoloma, as it is set forth in the bill.

The mistake alleged consisted in this: General Miles did not intend to embrace any of section 33 in the deed sought to be reformed, and intended all of it for Mrs. Miles, but did intend to convey Quofoloma, which was thought to embrace all of Horseshoe. If the deed be reformed, Mrs. Miles will be deprived of 110 acres of the best land in Good Hope plantation and section 33, all of which was intended and all of which was embraced in every description of Good Hope appearing in any writings ever made by General Miles, giving the land composing that plantation, and no part of which was ever embraced in any section of land called Quofoloma, or in any conveyance embracing any part of Quofoloma land.

The principle which lies at the foundation of all suits to reform is this, that the court cannot make such a contract as the parties ought to have made, or would have made, if better informed, but merely makes it what the parties intended it should be. *Williams* v. *Hamilton,* 65 Am. Rep., 482; *St. Anthony Falls Co.* v. *Merriman,* 33 Minn., 42.

The intention meant, in saying that equity will perform a written agreement so as to express and carry out the intention of the parties, is the intention of both parties to something upon which their minds actually met. *Williams* v. *Hamilton,* 65 Am. Rep., 484.

Had the agreement been made to convey lot 4, and had there been merely a mutual mistake as to its boundaries, this would have constituted no grounds for reformation of the deed. *Crookston Imp. Co.* v. *Marshall,* 47 Am. St. Rep., 614.

Equity will not reform a contract to make it express what the parties but for a misapprehension would have intended. The real question is, What did the parties intend at the time, informed as they were? *Wise* v. *Brooks,* 69 Miss., 891.

"In order that a mistake made may come within the cogni-

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Brief for appellants.

zance of a court of equity, it must be shown to be: Material, or the moving cause of the complaining parties; and mutual, or shared by both parties to the transaction; and unintentional; and free from negligence; and complainant must have an equity superior to him against whom he seeks relief." 15 Am. & Eng. Ency. Law (1st ed.), 628; 20 Am. & Eng. Ency. Law, 826.

Courts of equity do not grant the high remedy of reformation upon probability, or even upon preponderance of evidence, but only upon a certainty of the error. Pomeroy's Eq. Jur., sec. 856; *Crofton* v. *B. & L. Assn.*, 77 Miss., 166; *Wilczinski* v. *L., N. O. & T. R. R.*, 66 Miss., 595; 20 Am. & Eng. Ency. Law, 813, 821.

"It is an elementary rule of equity jurisprudence that a court of chancery will assist only the vigilant. Hence, it will not relieve against the results of an essential error when, by the use of ordinary diligence, the party affected could have had a knowledge of the truth, or against an error of expression which occurred through complainant's negligence in the framing of the instrument, or through mutual carelessness in procuring a description of the land conveyed. . . . .

"Nor does the circumstance that both were equally mistaken concerning the fact, affect the transaction, if the mistake was one which either, by the exercise of ordinary diligence, might have discovered. Where the circumstances put both on inquiry neither can be heard to complain of a result of which his own want of vigilance was the proximate cause." 20 Am. & Eng. Ency. Law (2d ed.), 831.

The bill itself shows that there was no consideration, valuable, for the deed sought to be reformed. The attempt to make one, by evidence, failed utterly.

"If there be no consideration, or if the only consideration be a moral duty or natural affection, which are termed good, but not valuable consideration, the court of chancery will not interfere." Adams Equity, 78.

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Brief for appellants.

"It is a fundamental principle that equity will not decree the specific execution of a contract unless the undertaking to be enforced is founded upon valuable consideration, moving from the party in whose behalf the performance is sought; in other words, the remedy cannot be obtained for a merely voluntary agreement." Pomeroy on Contracts, sec. 54.

"Where a contract is entirely voluntary or without consideration, or is in effect and substance a mere gift, it will not be specifically enforced, for equity will not compel a party to be generous." *Shackelford* v. *Hanley,* 10 Am. Dec., 302.

The will of General Miles is made an exhibit in the bill. Section 33 is mentioned in that will, is given and bequeathed to Mrs. Miles, and is not mentioned in the deed to appellees. They seek to put it in the deed, and to debar, by injunction, Mrs. Miles from setting up any claim to the will. This is in effect a reformation by indirection. It is an old and well-established principle of law that what cannot be done directly, cannot be done indirectly. Mistakes in wills to describe property intended to be devised cannot be corrected by reformation. *Ehrman* v. *Hoskins,* 67 Miss., 192; *Schlottman* v. *Hoffman,* 73 Miss., 188; *Johnson* v. *Delome,* 77 Miss., 15; 15 Am. & Eng. Ency. Law (1st ed.), 663.

"Where there is both a particular description by metes and bounds, or by courses and distances, and a general descriptive designation, the latter, as a rule, yields to the former." 5 Cyc. Law & Pr., 880.

"While no inflexible rule can be laid down with regard to the relative weight to be given to the conflicting element of a description of boundaries, it may be stated generally that when all the calls of an entry, survey, deed or grant cannot be complied with because some are vague or repugnant, such vague or repugnant calls may be rejected or controlled by other consistent and certain material calls." 5 Cyc. Law & Pr., 912.

"A particular description prevails over and limits the appli-

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Brief for appellees.

cation of a general description in whatever order they may come." Tiedman on Real Estate, 827, 828.

C. H. Williams, and *Tackett & Smith,* for appellees.

It was the intention of all the parties to this transaction, which was the consummation of a family settlement, that this deed from W. R. Miles to Theus N. Miles should convey "Quofoloma" plantation, and this land in controversy was omitted by mutual mistake from the particular description thereof. Supporting this we show: That the issue as to the intention to convey "Quofoloma" plantation is not raised by the pleadings, and the defense there seems to be that this land is not a part of "Quofoloma," but is a part of "Good Hope" plantation. The deed on its face expresses the intention to convey Quofoloma plantation. The will under which Mrs. Miles claims title states in so many words that by this deed he had conveyed Omega and Quofoloma plantations to Theus Miles. In July, 1897, either just after or just before this family settlement, General Miles told Capt. C. J. DuBuisson that he had given, or intended to give, his Omega and Quofoloma plantations to his son Theus. Kellogg, a witness for defendant, states that General Miles told him he intended to convey to Theus the Omega and Quofoloma plantations, and that the General told him this on many occasions. The intention to convey Quofoloma plantation by this deed is further proven by the grantees at once taking possession of the entire Quofoloma plantation, and of the land in controversy as a part thereof, and holding possession, ditching, clearing, leasing, collecting rents, and exercising all acts of ownership with the full knowledge of General Miles and without challenge of their right by him. Not until after his death was this right disputed, and it would not have been disputed then if Theus Miles himself had not discovered and made known the error in the description, so thoroughly was it known that this land was a part of Quofoloma plantation.

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Brief for appellees.

This land in controversy is and always has been a part of Quofoloma plantation, and General Miles so recognized it during his life. In support of this, General Miles, in this family settlement and in all instruments relating to it, divides his entire real estate into four parts, each part designated by its plantation name of Omega, Quofoloma, Good Hope, and Black Bayou. By the will and this deed he makes a complete disposition of all of his real estate by devising two plantations—Good Hope and Black Bayou—to Mrs. Miles, and conveying two—Quofoloma and Omega—to Theus by this deed. When he delivered possession under this deed to Theus, he delivered possession of the two plantations—Omega and Quofoloma—and as part of the latter delivered possession of all the land in controversy. The very topography and shape of the land in controversy leads one to the natural conclusion that it is a part of Quofoloma, and could not have been a part of Good Hope. The word "Quofoloma" is an Indian word, generally said to mean "horse's hoof," and the name was undoubtedly given the plantation because of its shape, and for the same reason this particular part of the plantation from the heel to the toe was popularly called "Horseshoe Island," and the body of water surrounding it, "Horseshoe Lake," or Bayou. The map attached hereto shows that the land in controversy is at the toe of this horseshoe, entirely cut off from the balance of section 33 and from every other plantation or body of land, except Quofoloma.

Every one who ever bought or leased Quofoloma plantation, buying and leasing by plantation names, has gone into possession of this land in controversy as a part of said plantation, but Mrs. Miles now claims it in spite of this and in spite of the fact that her dead husband was more than generous to her in the disposition of his property, having given her, practically, twice as much as both sons together. No lessee of Good Hope ever did take possession of this land.

The right of a court of equity to reform a deed on account of

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Brief for appellees.

mutual mistake is unquestioned and hardly needs citation of authorities to support it. Almost all written instruments may be reformed. The following are among the most important: deeds, mortgages, leases, bonds, and marriage and family settlements. 3 Pomeroy Eq. Jur. (2d ed.), sec. 1376; 18 Ency. Pl. & Pr., 801; 2 Pomeroy Eq. Jur. (2d ed.), sec. 852.

As to the proof necessary to warrant this relief, our own court says that the test of the sufficiency of evidence warranting the reformation of an instrument is simply its capacity to satisfy the mind of the court. *Phoenix Fire Ins. Co.* v. *Hoffheimer,* 46 Miss., 645.

A deed may be reformed where the parties understand the meaning of the language used in the description and believed it corresponded with the actual boundaries of the land intended to be conveyed, but were mistaken therein. 15 Am. & Eng. Ency. Law (1st ed.), 656, note; *May* v. *Adams,* 58 Vt., 74; *Johnson* v. *Tabor,* 10 N. Y., 319; *Bush* v. *Hicks,* 60 N. Y., 298; *Crookston Imp. Co.* v. *Marshall,* 47 Am. St. Rep., 613; *DeRiemer* v. *DeCantillion,* 4 Johns. Chan. (N. Y.), 83.

The fact that the defect or mistake is of such a character that it may be aided by parol evidence and made a defense in a suit at law does not take away the jurisdiction of a court of equity to reform the instrument. *Cummings* v. *Steele,* 54 Miss., 647; *Green* v. *Dickson,* 72 Am. St. Rep., 920.

These deeds and the will are all one instrument; the result of a family council. These instruments all refer to one another; are parts of one and the same transaction; executed in pursuance of the same common purpose, and are so closely connected, the one with the other, as to constitute one deed of partition, as it were. This inseparable connection is more clearly shown by the will. *Cummings* v. *Freer,* 26 Mich., 135; *Tollett* v. *Tollett,* 1 W. & T. Lead. Cases (H. & W.), 189; Bispham's Equity, sec. 194; Fonblank's Equity, 340, note B;

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Opinion of the court.

Dennison v. *Goering,* 7 Pa. St. Rep., 175; *Powell* v. *Monsey,* 98 N. C., 426 (s. c., 2 Am. St. Rep., 343).

Argued orally by *E. F. Noel,* for appellants, and by *S. M. Smith,* for appellees.

TRULY, J., delivered the opinion of the court.

Two questions of law are presented by this record: First, whether the instrument in question is properly subject to reformation under the facts found by the chancellor to be true; second, do the appellees occupy such a position that a court of equity will intervene in their behalf?

The power of a court of equity to compel reformation of deeds, and make them conform to the real intention of the parties, in cases where mutual mistake of fact has occurred, is so firmly established as to scarce demand citation of authority. It is elementary that the province of a court of equity is to see that the real wishes of contracting parties should not be frustrated by mistakes innocently and mutually committed. 2 Pom. Eq. Jurisprudence, secs. 852–870; *Ins. Company* v. *Hoffheimer,* 46 Miss., 645; *Simmons* v. *North,* 3 Smed. & M., 71; 18 Ency. Pl. & Pr., p. 774, note 1. "An ancient and unquestionable jurisdiction of a court of equity is to grant relief on account of a mistake of facts in written contracts, whether executed or executory, if the writing expresses something of substance variant from what the parties actually intended." *Dunbar* v. *Newman,* 46 Miss., 234. A court of equity will entertain a suit for the reformation of a deed when there is a material mistake in the description of lands intended to be conveyed, so that more or less or different property is included than the parties in fact intended, and the inaccuracy of the description will be corrected. 18 Ency. Pl. & Pr., p. 780; *Gwyer* v. *Spaulding,* 33 Neb., 573 (50 N. W., 681); *Improvement Company* v. *Marshall,* 57 Minn., 333 (59 N. W., 294; 47 Am. St. Rep., 612); *DeRiemer* v. *DeCantillon,* 4 Johns. Ch., 88; *May* v. *Adams,* 58

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Vt., 74 (3 Atl., 187). And a court of equity will likewise interpose and correct a mistake of fact, even though the parties employ the very terms they designed to use. The rule is not different where there is a mistake in the omission or insertion of words contrary to the intention of the parties, and when they, understanding the language used in the description, believe it to correspond with the actual boundaries of the lands intended to be conveyed and are mistaken. So decided in *Bush* v. *Hicks,* 60 N. Y., 302, where the court further says: "The counsel is mistaken in supposing that the deed can be reformed only in cases where the mistake consists in the omission or insertion of words or clauses contrary to the intention of the parties. Although the parties understood what language was contained in the deed, if they believed the description corresponded with the actual boundaries of the land intended to be conveyed, and were mistaken, the cause for reformation was made out." Viewing the facts developed by this record in the light of the principles of law above announced, we entertain no doubt that it was within the province of a court of equity to order a reformation of the deed from William R. Miles to appellees, so that the same could, in truth, express the real intention of the parties. It may well be true that both parties employed the descriptive terms used in that instrument advisedly and intentionally, and yet, if this was under the mistaken impression that all of the land in the Horseshoe was included in the description, the court properly ordered the reformation, so that the deed might convey what the parties intended it should convey. The chancellor decided that it was the intention of William R. Miles that appellee should have all of Quofoloma plantation, and it is scarce open to the suggestion of a doubt that the land in the Horseshoe was considered and treated by all parties as a portion of that plantation. The fact that appellees entered into possession of the land in controversy under the deed in question, that this possession was recognized and acquiesced in by the

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grantor, and that possession of this tract had always passed as a portion of Quofoloma, when considered in connection with the geographical location of the tract, surrounded on three sides by other lands acknowledged to belong to Quofoloma, and separated from the other plantations by impassable barriers, demonstrates with practical certainty that the land in controversy was intended by all parties to pass under the plantation name, "Quofoloma." When two descriptions are employed in a deed, the court will adopt that one "which, in the light of surrounding circumstances, can be said to effectuate most clearly the intention of the parties." Devlin on Deeds, sec. 1038; *Rutherford* v. *Tracy,* 48 Mo., 325 (8 Am. Rep., 104); *O'Herrin* v. *Brooks,* 67 Miss., 266 (6 South., 844); 2 Pom. Eq. Juris., sec. 871. To hold that a court of equity could not interpose to correct mistakes for the reason alone that the parties used the terms they actually intended to use would be to curtail its powers to a hitherto unheard of extent. Most mistakes of fact in conveyancing, except those caused by clerical misprision, arise in cases when descriptive terms are intentionally employed under the mistaken impression that they apply to the property sought to be conveyed.

It is, however, contended by appellants that, though ordinarily a court of equity might authorize a reformation, in the instant case appellees have no standing in court to warrant this interposition in their favor. And in support of this contention, appellants rely upon the principle that equity will not interpose to order a reformation of a deed in favor of a volunteer. This principle has no application to the case at bar. Appellees are not volunteers. A part of the consideration of the conveyance from William R. Miles to them was the purchase by Theus N. Miles of his brother's interest in the estate of William R. Miles for the sum of $10,000. This purchase enabled William R. Miles and Edward H. Miles to each carry out his own personal wishes in reference to the interest of Edward H. in his father's

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estate, and this is sufficient to prevent the operation of the rule against volunteers being invoked against appellees. But a second and stronger reason is that the instrument by which Quofoloma and Omega plantations were vested in appellees, and that by which Mileston and Good Hope plantations were vested in appellant Mary R. Miles, constitute, in fact, one and the same transaction. All parties deraign from a common source, and stand before the court in the same attitude as if they had inherited the property jointly, and then undertaken to amicably divide the same, and a mutual mistake had occurred in their deeds of partition. In *Miles* v. *Miles,* 78 Miss., 904 (30 South., 2), where the identical instruments now under review were considered, it was held that they formed parts of one and the same transaction, and evidenced a family settlement then consummated by William R. Miles, by which all of his property was divided among his heirs. The power of a court of equity to reform instruments and correct mistakes growing out of such transactions in proper cases is universally recognized. Pom. Eq. Juris., sec. 877; 3 Pom. Eq. Juris., sec. 1376. The well-settled rule that equity will not interfere in favor of a volunteer against a grantor to correct a mistake or reform a defective conveyance is based upon the idea that the volunteer is but the recipient of a bounty, and has no enforceable claim or demand. This is sound law, but not applicable to the case here presented. Here the grantor's interests are not involved. This is not a contest between a prior and subsequent voluntary grantee, for appellants and appellees claim from the same source, and derive title by virtue of the same transaction. The disputed question is as to the real intent of the common grantor. This being ascertained, a court of equity will decree that it be enforced. Such cases do not fall within the rule denying the aid of equity to voluntary grantees. *Adair* v. *McDonald,* 42 Ga., 506; *Huss* v. *Morris,* 63 Pa., 372; 18 Ency. Pl. & Pr., p. 787. In *Cummings* v. *Freer,* 26 Mich., 130—a case strikingly in point—

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where the father had undertaken to divide his estate in his lifetime, and after his death suit was brought to reform one of the conveyances, Christiancy, C. J., says: "Independent of the agreement, the transaction in reference to the deed, as set forth in the bill, was this: The grantor undertook to convey to his four sons, respectively, the whole of his lands, by conveying separate parcels of them to each, though, in our view, it makes little difference whether he owned other lands or not. It is entirely unimportant whether any consideration was paid to the father or not. The father was dividing his lands upon this section among his four sons, and the case, as presented by the bill, stands upon substantially the same principle as if these four sons had inherited or otherwise owned the whole of the lands in common, in proportion to the value of the interests undertaken to be conveyed to each, and they had undertaken to make an amicable partition of the lands by conveying to each his respective portion, and the same mistake had been made; the portion received by each being a consideration for his conveyance to the other." And after referring to the general principle that equity will not assist a grantee in a voluntary deed, he continues: "But after such a deed has been executed and delivered, and the grantee, on the faith of it, has gone into possession, made improvements, and expended money upon it, I see no reason to doubt his right to sustain a bill against the grantor or his heirs for the correction of a mistake in the deed, if he can show the mistake, and the land clearly intended to have been embraced." The case at bar presents even stronger reasons why the rule against volunteers cannot be invoked against appellees. They not only entered into possession of the land under the deed, with the knowledge of the grantor, and made improvements and expended money, but, as a part of the consideration of the deed from William R. Miles, Theus N. Miles, one of the appellees, obligated himself to pay his brother a large sum of money for his interest in the estate of William R.

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Miles, including the land in controversy. An inspection of the deeds and the will, component parts of the transaction by which the family settlement was arranged and perfected according to the plan and desires of William R. Miles, makes it perfectly manifest that this purchase by Theus R. Miles formed a part of the consideration moving William R. Miles to divide his property among his heirs in the manner selected.

For the reasons indicated, we are of the opinion that the appellees were entitled to invoke the aid of a court of equity to reform the deed so that the real intention of the parties could be effectuated, and, accepting the finding of the chancellor upon disputed questions of fact as conclusive, we find no grounds for disturbing the decree. If error, the rulings of the chancellor on the admission of testimony could not affect the result.

The decree is affirmed.

BOARD OF LEVEE COMMISSIONERS FOR THE YAZOO-MISSISSIPPI DELTA *v.* PRESSLY E. NELMS ET AL.

TENANTS IN COMMON. *Life estate. Conveyance by some. Effect. Rights of remaindermen.*

Where land is owned by several persons, one having a fee simple estate in an undivided one-half interest, and another a life estate, and still others the remainder in the other half, a sale of a specific part of the land by the fee-simple owner of the undivided one-half of the whole tract will not vest in the purchaser a half interest in the whole tract, although the life tenant of the other undivided half joined therein, but the conveyance will be subject to the ascertainment of specific shares by partition and is voidable by the remaindermen not parties to it.

FROM the circuit court of DeSoto county.

HON. J. B. BOOTHE, Judge.

Nelms and others, appellees, were plaintiffs, and the Board of Levee Commissioners for the Yazoo-Mississippi Delta, appel-

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Brief for appellees.

lant, was defendant in the court below. From a judgment in plaintiffs' favor the defendant appealed to the supreme court. The opinion states the case.

J. T. Lowe, for appellant.

The learned judge, on the trial below, acceded to the contention of appellees that the case of *Richardson* v. *Miller,* 48 Miss., 335, sustained appellees' position, and held that the deed from Hamby and Nelms was incompetent, being absolutely void as to appellees, rendered so, obviously, by the subsequent partition between Fulmer and the Nelmses, overlooking the fact that appellants by virtue of their said deed from Hamby, so far as the 29 67-100 acres were concerned, became tenants in common with an undivided one-half interest, with the said appellees as to the 29 67-100 acres. *Kenoye* v. *Brown,* 82 Miss., 607 (s. c., 35 So. Rep., 163). And without further remarks on this point we content ourselves by calling attention to *Kenoye* v. *Brown, supra,* which abundantly sustains our contention, and renders a reversal of this cause inevitable.

St. John Waddell, and *Mayes & Longstreet,* for appellees.

The Mississippi doctrine is that a purchaser of a part of a common estate, from one co-tenant, takes only the interest of his grantor therein, and his purchase is subject to the rights therein which may be acquired by a non-assenting co-tenant, in any future partition of the common estate, and that in such future partition the non-assenting co-tenant, if assigned or if he acquires in severalty a part or all of the portion sold, takes it free of any claim of title on the part of the grantee in the deed, who must look alone to his covenants of warranty in said deed, if any, for protection. *Richardson* v. *Miller,* 48 Miss., 335; *Kenoye* v. *Brown,* 82 Miss., 607 (s. c., 35 So. Rep., 163).

In the case of *Kenoye* v. *Brown* Chief Justice Whitfield made an exhaustive examination of the authorities governing this question, and reaffirmed the case of *Richardson* v. *Miller,*

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and construed the rule as announced in that case from Kent to mean, as above stated, that the deed of one co-tenant to a separate portion of a common estate was not void, but only voidable at the election of the non-assenting co-tenant, and that the grantee in such deed took the granted premises subject to the contingency of the loss of it, if, on partition of the general tract, the special tract should be allotted to the non-assenting co-tenant.

Argued orally by *J. T. Lowe,* for appellant, and by *J. C. Longstreet,* for appellees.

CALHOON, J., delivered the opinion of the court.

By Mrs. Dancy's will Hamby took an undivided half interest in fee in a tract of land, a part of a strip of which is the subject of this litigation. The other half went, under the same will, to Eben Nelms for life, with remainder in fee to appellees. The testator, Mrs. Dancy, died in 1894. On July 20, 1896, Eben Nelms, the life tenant of the half interest, and Hamby, the owner in fee simple of the other half, sold at a valuation of $50 per acre, to the board, for levee purposes, and conveyed to it by a conveyance purporting to carry the fee-simple title to the whole of the strip. Afterwards, on September 19, 1896, Hamby conveyed his half interest in fee in the whole tract to Fulmer, but excepted the strip from his warranty. Afterwards, on June 23, 1897, Fulmer, the owner of half in fee, and Eben Nelms, the owner of the life estate in the other half, and the appellees, the remaindermen in fee, all joined in a partition deed of the whole tract, by which the part of the strip in controversy, containing 15 72-100 acres, was allotted to Eben Nelms and the remaindermen, and the rest of the strip fell, by the allotment, to Fulmer. Eben Nelms died July 16, 1902, six years, less four days, from the date of the conveyance by him and Hamby to the levee board. Then, within a month, the remaindermen, appellees here, commenced this

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proceeding under the eminent domain acts of February 7, 1894 (Laws 1894, p. 95, ch. 85), and May 18, 1897 (Laws 1897, p. 23, ch. 19).

The position of the board that it is entitled to the half interest of Hamby in the whole strip is untenable. When he and Eben Nelms, the life tenant, conveyed to the board, the conveyance was subject to any ascertainment of the specific shares by partition between the owners of the fee. The deed was not void, but voidable by the remaindermen not parties to it. *Kenoye* v. *Brown,* 82 Miss., 607 (s. c., 35 South., 163); *Richardson* v. *Miller,* 48 Miss., 335. When the board took and expropriated the strip at a conventional price of $50 per acre, it should have had the remaindermen join in the conveyance; otherwise, it is liable to them for the value of their allotment on partition, less the value of Eben Nelms' life estate, with legal interest on the balance; and, by agreement, the value was $50 per acre. *Callicott* v. *Parks,* 58 Miss., 528.

The point of inquiry here is the value of the interest of the remaindermen in the property when expropriated. This has been manifestly found, practically, and we do not stop to notice whether there was or was not error below as to evidence admitted or excluded, or instructions. By some miscalculation the verdict is for $16.93 too much on the proper basis of estimate. It should have been for $831.32 instead of $848.25, and, as appellees offer to remit the $16.93, we affirm the judgment for $831.32 at costs of appellant.

Affirmed.

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Syllabus.

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MIDDLESEX BANKING COMPANY ET AL. v. SARAH M. FIELD.

1. DEEDS. *Construction. Estates tail. Limitations over to heirs of donor. Code* 1880, § 1190. *Code* 1892, § 2436.

Under Code 1880, § 1190 (Code 1892, § 2436), prohibiting estates tail, but providing that a conveyance or devise may be made to a succession of living donees, not exceeding two, and the heirs of the remainderman, and in default thereof to the right heirs of the donor in fee simple:

(*a*) A grantor who reserves out of the operation of his deed a life estate for himself cannot be counted as one of the donees within whose life the ultimate fee must vest in order to preserve the deed under the rule against perpetuities.

(*b*) A conveyance to two designated persons, with cross-remainders in favor of the survivor in case of the death of either without issue, and a conditional limitation over to a third person, the right heir of the donor, in case of the death of the two first takers, without issue, is valid.

(*c*) A limitation over to a designated person, being one of the right heirs of the donor, conditioned on the death of two specified donees without issue, is valid.

(*d*) The right heirs of the donor take by purchase, and not by descent.

(*e*) The section by its express terms is applicable to conveyances as well as devises.

(*f*) Its object is to prescribe a limit of time beyond which the vesting of the estate in fee cannot be suspended, but within that limit it permits the exercise of unbounded discretion by the donor.

2. SAME. *Code* 1880, § 1203. *Code* 1892, § 2448.

Under Code 1880, § 1203 (Code 1892, § 2448), changing the common law and providing that a clause in a deed or a will vesting title in one person in case of the death of another, without issue of his body, shall be held as a limitation to take effect when the person named shall die without issue of his body living at the time of his death or born to him within ten months thereafter, unless the intention of the limitation be otherwise expressly and plainly declared on the face of the instrument creating it:

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(a) The first taker has an estate in fee, determinable on the contingency of death without surviving issue, and the limitation over is conditioned on the death of the first taker without issue.

(b) A limitation over in case of the death of the first taker without issue is, in the absence of a plain declaration to the contrary, a limitation in case of his death without issue living at the time of his death or born in ten months thereafter, so that the first taker has a life estate, and the issue surviving, or born within ten months, will have a fee simple by way of an executory devise; but if the deed or will plainly declares a different construction, an estate tail will be created, which under the statute (Code 1880, § 1190; Code 1892, § 2436) is a fee simple in the first taker.

(c) A conditional limitation does not cut down the prior estate in fee, nor extend nor accelerate its termination, but takes effect only at its termination.

3. SAME. *Concrete case.*

A deed conveyed certain property to A. to hold the same on the following trusts: (1) That the grantor should have the exclusive right to the possession and control of the property granted during his lifetime, and be entitled to the rents and profits arising therefrom; (2) that on the death of the grantor A. should have the possession and control of the property, and receive for his services one-third of the rents and profits, and use the remainder of the rents and profits for the maintenance and education of B. and C. It was then provided that on the death of A. the property should vest in B., one-half for herself and the other half in trust for C.; but in case of the death of B. or C. "without issue of the body" the whole property should vest in the survivor, subject to the rights of A., and in case both B. and C. should die without issue the whole property should vest absolutely in A. or his heirs at law. The court decided that the effect of the deed was to reserve to the grantor a legal life estate, with remainder over in fee to B. and C., their fees being determinable on the contingency of dying without surviving issue, in which case there were cross-limitations in favor of the survivor and a conditional limitation over to A. in case of the death without surviving issue of both B. and C.

4. CONTRACTS. *Settlement of litigation. Compromise.*

An intelligent, competent litigant, fully informed and advised by able counsel, who, after time for reflection, makes a settlement of pending litigation, there being no concealment on the part of any

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one, by which he receives money, is bound by the settlement and precluded from further prosecution of the suit.

FROM the chancery court of Bolivar county.

HON. A. McC. KIMBROUGH, Chancellor.

Bill by Eldon C. Field against the Middlesex Banking Company and others to procure the cancellation of certain instruments on the ground of fraud. Eldon C. Field died, and the suit was revived in the name of Bate Field as his sole devisee and legatee. Subsequently Bate Field died, and the suit was revived in the name of Mrs. Sarah M. Field as devisee and legatee. From the decree rendered, certain defendants appealed to the supreme court.

For a previous decision in the case, see *Field* v. *Middlesex Banking Co.*, 26 South., 365; s. c., 77 Miss., 180.

Eldon C. Field, a bachelor, owned four plantations in Bolivar county, Miss., and in November, 1889, he had a stroke of paralysis, which for a time affected him seriously both mentally and physically. His property was worth about $30,000, and was incumbered. On January 7, 1890, he executed a power of attorney to his brother, J. H. Field, Sr., making him his general agent, with large powers. On August 30, 1890, he executed a deed to said J. H. Field, Sr., which is set out in full in the opinion of the court by WHITFIELD, C. J., conveying to him all of said plantations on certain trusts and limitations therein set out. Acting under this deed, J. H. Field, Sr., undertook to borrow money on these plantations, and was informed by the parties to whom he applied that they would not make loans to trustees, and it was then agreed that the places should be sold under the deeds of trust then on them and a judgment then in force against Eldon C. Field, and that Julien Field should purchase and take the title in his name; and the Middlesex Banking Company agreed to furnish the money with which to make these purchases, and to lend Julien Field additional money on them. Under this arrange-

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ment the titles were all conveyed to Julien Field, and he borrowed the additional money agreed to be furnished, and gave deeds of trust on the plantations to secure it; and under these deeds of trust they were all subsequently sold, and purchased by the Union Investment Company, but before these sales, at the request of the attorney for the Middlesex Banking Company, E. C. Field and J. H. Field, Sr., executed a quitclaim deed to Julien Field. On April 20, 1894, Eldon C. Field filed his bill in the chancery court of Bolivar county against J. H. Field, Sr., Bate Field, J. H. Field, Jr., and Julien Field, the Middlesex Banking Company, the Graves & Vinton Company, their agent, and Lee J. Lockwood, manager of the Graves & Vinton Company, the trustee. The bill alleged that the power of attorney executed to J. H. Field, Sr., was void because he was mentally incapacitated to execute it, and that the deed of August 30, 1890, was void for the reason that J. H. Field, Sr., represented to him that it was a will; that the quitclaim deed to Julien Field was void because it was never known of or accepted by him; and that each and all of the deeds and deeds of trust by means of which the said property was incumbered and sold were void because brought about by a conspiracy between J. H. Field, Sr., with Julien Field and the other defendants to breach the trust of August 30, 1890. The bill sought the cancellation of all these instruments.

These defendants all answered this bill, denying the equities set out therein. Some testimony was taken, but E. C. Field died March 20, 1895, testate, leaving all his property to Miss Bate Field. In April, 1895, Miss Bate Field employed the same counsel who had represented E. C. Field and probated the will of E. C. Field, and had herself appointed administratrix with will annexed, and revived the suit begun by E. C. Field in the name of Bate Field, sole devisee and legatee of E. C. Field. Some further proof was then taken. On November 25, 1896, after considerable negotiations, a compromise

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was effected of this suit, referred to by Justice TRULY in his concurring opinion, and Bate Field and J. H. Field, Jr., executed a special warranty deed to L. J. Lockwood, who afterwards conveyed the land to the Union Investment Company. In February, 1897, before the decree dismissing the cause had been entered, Miss Bate Field filed her supplemental bill, in which she sought to set aside and cancel the compromise and the special warranty deed and to continue the suit, and asked for the cancellation of the several deeds mentioned in the pleadings. The defendants all answered this bill, and the cause was heard, and a final decree rendered dismissing the bill. From that decree complainant appealed to the supreme court, and the cause was reversed, with instructions to allow the pleadings reformed. 26 South., 365; 77 Miss., 180. After the mandate was filed in the lower court, Miss Bate Field filed a cross-bill styled "Cross-bill of Bate Field, one of the defendants, against her co-defendants, J. H. Field, Sr., Julien Field, Lee J. Lockwood, the Graves & Vinton Co., the Middlesex Banking Co., and the Union Investment Co." In this bill she sets up the execution of the deed of August 30, 1890, the death of J. H. Field, Jr., without issue, and that by the will of E. C. Field all his property was devised to her. She alleges that neither under the power of attorney nor the deed of August 30, 1890, was authority given J. H. Field, Sr., to incumber any of the land; that J. H. Field, Sr., the Middlesex Banking Company, the Graves & Vinton Company, their agents, and Lee J. Lockwood, combined and confederated to breach the trust under which the lands had been conveyed to J. H. Fields, Sr., on August 30, 1890; to disincumber said lands of said trust, and to get the title so that the lands would be under the unrestrained control of J. H. Field, Sr.; that for that purpose they entered into a scheme under which the title should be vested in Julien Field, who was to hold it subject to the will and control of J. H. Field, Sr. The bill then sets out the various

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deeds, deeds of trust, etc., and charges that they were parts and parcels of the original illegal and fraudulent scheme. The bill then charges that the legal title is in Julien Field, a mere volunteer, holding it as the agent of J. H. Field, the delinquent trustee, for complainant and her brother and E. C. Field; that the fraudulent purpose was known to and participated in by all the defendants; and that the property is in equity chargeable with the same trusts under which it was held by J. H. Field, Sr. The bill avers: That under the deed of August 30, 1890, and by reason of the death of J. H. Field, Jr., there was vested in her a complete equitable estate in fee simple of all said lands, the limitations sought to be created in J. H. Field, Sr., being void for remoteness, and against the rule forbidding perpetuities in this state; and that, whether her title be considered as derived under this deed or under the will of E. C. Field, she is seized of a complete equitable estate in said lands and is entitled to a transfer of the legal title; that on the 21st day of November, 1896—the day after she obtained her majority—and without competent and sufficient advice, and without the knowledge of the various fraudulent acts of the defendants, she and her brother executed a quitclaim deed in consideration of $1,000 paid to each of them, whereby they conveyed to L. J. Lockwood their interests in said lands. The bill here charges that defendants willfully and knowingly concealed from them all knowledge of the various fraudulent schemes and actions charged; that she was not advised of any interest she had under the deed of August 30, 1890, and that she only intended to convey such estate as she acquired under the will of E. C. Field. She tenders the money received for the quitclaim deed. The defendants answered, denying specifically the equities of the cross-bill.

Miss Bate Field died testate, leaving all her property to her mother, Mrs. Sarah M. Field, and the suit was revived in her name. A large amount of testimony was taken, and on the

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final hearing there was a decree sustaining the cross-bill and granting the relief sought therein. From that decree the Middlesex Banking Company, Lee J. Lockwood, the Graves & Vinton Company, and the Union Investment Company appeal.

Green & Green, and *Calvin Perkins,* for appellants.

Carroll, McKellar & Bullington, and *Tim E. Cooper,* for appellees.

[The briefs of counsel in this case were unusually full and able, but in view of the great length of the case a synopsis is not made of any one of them.]

Argued orally by *M. Green* and *Calvin Perkins,* for appellants, and by *Tim E. Cooper* and *William H. Carroll,* for appellees.

WHITFIELD, C. J., delivered the opinion of the court.

The chief question for solution is, Is the limitation over of the ultimate fee to J. Harris Field, Sr., by the deed of August 30, 1890, valid? That deed is as follows:

"This deed of conveyance, made and executed at Florence, Ala., on this 30th day of August, 1890, by and between Eldon C. Field, hereinafter designated as the first party, and J. Harris Field, Bate Field, and J. Harris Field, Jr., hereinafter designated as the second parties, witnesseth: That the first party, for and in consideration of the natural love and affection which he has for the second parties (his brother, niece, and nephew), does hereby bargain, sell, and convey to the said J. Harris Field, in trust for the said Bate Field and J. Harris, Jr., the following lands: [Here follows a description of the four plantations in controversy.] To have and to hold the said lands, with all and singular the appurtenances thereunto belonging, unto the said J. Harris Field as trustee as aforesaid, upon the trusts and conditions as herein provided—that is to say:

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"1. That the first party shall have and retain during his natural life the exclusive right to the possession of all of the said lands, and shall have the entire management and control of the same, and shall be entitled to all the rents, income, and profits arising therefrom as fully as if he were the absolute owner of the lands.

"2. That on the death of the first party, the said J. Harris Field, as trustee aforesaid, shall take possession of all of said lands, and shall manage and control the same during his natural life, and shall receive for his services as such trustee one-third of the rents, incomes, and profits of said lands. During the minority of the said Bate Field and the said J. Harris Field, Jr., the said trustee shall use the remaining two-thirds of the rents, incomes, and profits of the lands for their maintenance, support, and education, or he may hold, use, or invest the same as he may deem fit for their interest, and he shall not be liable for any loss that may occur in the management and control of said trust property or of the rents, incomes, and profits thereof, it being the intention of this deed to give said trustee large powers and discretion. The said trustee, J. Harris Field, after the death of the first party, may, if he deems it advisable, sell or exchange said lands or any part thereof, and, in case of sale, shall reinvest the proceeds in other property, which, together with any property received in exchange for said lands or any part thereof, shall be held subject to all trusts and conditions and terms of this deed as fully as if incorporated herein, and he shall have like authority and powers as to the property received in exchange and the property in which the reinvestment is made; and it is hereby expressly provided that purchasers from said trustee shall not be chargeable with seeing to the application of the purchase price received by said trustee for any property sold or exchanged, it being the intention hereof to give said trustee as full power and authority in making sales and conveyances as if he were the owner of the property.

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"3. On the death of said J. Harris Field all the property herein conveyed and all property hereafter acquired hereunder shall vest in the said Bate Field; one-half for herself, and the other half she shall hold in trust for the said J. Harris Field, Jr. She shall pay to the said J. Harris Field, Jr., annually one-half the net income, rents, and profits of such trust property, and she shall not be liable for failure to make said property productive nor for any loss that may occur in the management and control of the trust property or of the rents, incomes, and profits thereof. She has full power to make all needed and convenient improvements and repairs on said property and to apply the income and profits to the payment thereof, and she shall be the judge of what improvements and repairs are needed and convenient.

"4. Should the said Bate Field or J. Harris Field, Jr., die without issue of the body, the whole property herein conveyed shall vest in the survivor, subject to the rights of the said J. Harris Field hereinbefore mentioned; and in case both shall die without issue of their bodies, the whole property shall vest absolutely in the said J. Harris Field or his heirs at law if he be then dead.

"Given under my hand and seal this day and year above written.

"ELDON C. FIELD.

"Attest: CHAS. O. ROLFE."

(Acknowledged August 30, 1890, and filed for record September 3, 1890.)

The statutes which bear upon this question are as follows:

Rev. Code 1880, § 1189: "Every estate in lands, granted, conveyed, or devised, although the words deemed necessary by the common law to transfer an estate of inheritance be not added, shall be deemed a fee simple, if a less estate be not limited by express words, or unless it shall clearly appear, from the conveyance or will, that a less estate was intended to be passed thereby."

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Rev. Code 1880, § 1190: "Estates in fee tail are prohibited; and every estate which shall create an estate in fee tail shall be an estate in fee simple; provided, that any person may make a conveyance or a devise of lands to a succession of donees then living, not exceeding two; and to the heirs of the body of the remainderman, and, in default thereof, to the right heirs of the donor, in fee simple."

Rev. Code 1880, § 1201: "A conveyance or devise of land or other property to any person for life, with remainder to his heirs or heirs of his body, shall be held to create an estate for life in such person, with remainder to his heirs or heirs of his body, who shall take as purchasers, by virtue of the remainder, so limited to them."

Rev. Code 1880, § 1203: "Every contingent limitation, in any conveyance or will, made to depend upon the dying of any person, without heirs, or heirs of the body, or without issue, or issue of the body, or without children, or offspring, or descendant, or other relative, shall be held and interpreted as a limitation to take effect when such person shall die not having such heir, or issue, or child, or offspring, or descendant, or other relative (as the case may be) living at the time of his death, or born to him within ten months thereafter, unless the intention of such limitation be otherwise expressly and plainly declared on the face of the instrument creating it."

Rev. Code 1880, § 1197: "All conveyances or devises of lands made to two or more persons, or to a husband and wife, shall be construed to create estates in common, and not in joint tenancy or entirety, unless it shall manifestly appear, from the tenor of the instrument, that it was intended to create an estate in joint tenancy, with the right to the survivor or survivors; provided, this provision shall not apply to mortgages or devises or conveyances made in trust."

It is clear that Eldon C. Field excepted from and reserved out of the operation of this deed a legal life estate for himself,

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from which it follows that he cannot be counted as one of the donees within whose life the ultimate fee must vest. It is earnestly insisted by counsel for appellee that no legal life estate was left in Eldon C. Field after the execution of this deed; but that J. Harris Field, Sr., held the whole legal title, and held it as much for Eldon Field as for Bate and Harry—in other words, that Eldon C. Field limited an equitable estate for life to himself by this deed. Counsel counts on this language—to wit, "To have and to hold the said lands, with all and singular the appurtenances thereunto belonging, unto the said J. Harris Field, Sr., as trustee as aforesaid, upon the trusts and conditions as herein provided," etc.; but the language of the first clause clearly shows that what Eldon C. Field did was to reserve a legal life estate. He "retains" during his own life the "exclusive right to the possession of said property;" and he is to have the "entire management and control of the same as fully as if he were the absolute owner of the lands." J. Harris Field, Sr., is not to enter upon the possession of the property until the death of Eldon C. Field. The plain meaning, manifestly, is that Eldon C. Field reserves a legal life estate. We think the scheme of the deed was this: (1) To reserve to Eldon C. Field a legal life estate; (2) to convey the property after his death to Bate and Harry Field, with cross-limitations between them if either should die without issue living at his or her death; (3) to convey the ultimate fee in the property, if both Bate and Harry should die without issue living at the time of their respective deaths, to J. Harris Field, Sr. Bate and Harry took fees determinable upon the contingency of dying without issue living at his or her death, with a conditional limitation over to J. Harris Field, Sr. *Busby* v. *Rhodes*, 58 Miss., 237; *Halsey* v. *Gee*, 79 Miss., 193 (30 South., 604); *Brattle Square Church* v. *Grant*, 3 Gray, 142 (63 Am. Dec., 725)—a masterly exposition of the law as to conditional limitations.

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At the common law, under sec. 4 of the deed, "in case both shall die without issue of their bodies, the whole property shall vest absolutely in the said J. Harris Field," etc., the words "without issue of their bodies" would have imported an indefinite failure of issue, and they would have taken at common law only a fee tail by the conveyance; and the effect of § 1203, Rev. Code 1880, providing that the words "without issue of the body" in clauses like this shall be held and interpreted as a limitation to take effect when such person shall die without issue of the body living at the time of his death, etc., is to prevent the estate conveyed to Bate and Harry from becoming a fee tail. The limitation to J. Harris Field, Sr., is a conditional limitation over after the death of Bate and Harry, both, leaving no issue at their respective deaths. Such a conditional limitation does not cut down the estate in fee. It takes effect only at the termination of the prior estate, and neither extends the prior estate nor accelerates its termination. *Brattle Square Church* v. *Grant, supra.* Bate and Harry took estates in fee, determinable upon the contingency of their dying without issue at the time of their deaths, respectively.

It will not be out of place just here to look a little into the history and reason of this § 1203, Rev. Code 1880. The old construction defeated the intention in this way: Take a case: A. devises Blackacre to B. and the heirs of his body, and, if B. dies without issue (etc.), over to C. and his heirs. The intention of the devisor is to create an estate tail, and he meant the property to go to the heirs of B.'s body as long as there were any. The construction put on the words "die without issue" by the courts was in the line of this intention—to wit, that they meant not only issue of B. living at B.'s death, but any issue of B.—grandsons, great-grandsons, etc.—as long as any descendants of B. were living; and hence that there were two contingencies, on the happening of either of which the limitation to C. should take effect—to wit, failure of B.'s issue

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at B.'s death, and, second, failure of B.'s issue at any time in the future. The contingency was uncertain and indefinite—*i. e.,* the failure of issue was so—as no man could tell WHEN the issue would fail, and it might NEVER fail; and hence that the limitation to C. was not to take effect until B.'s descendants ultimately at an indefinite time failed. So far the intention of the testator was being carried out; but the courts, thus construing the words, of course gave B. an estate tail, and this he could bar, and acquire a fee simple, and sell the lands, and his heirs would not take what the devisor meant; and this resulted in a defeat of the devisor's intention. It is plain that it was not the *construction* of the words "die without issue" *alone,* that defeated the intention of the devisor, but the ***right*** given by law to *bar the estate tail resulting from* such construction. The two together operated the defeat of the devisor's intention, who meant an estate tail, and was ignorant of the law allowing it to be barred by his devisee.

Again, in the case stated, if B. died, leaving his wife *enceinte* of a son, he was esteemed at common law to die without issue living at the time of his death; or, if he had had one son, who married, and died, leaving *his* wife *enceinte* of a son, and then B. died before the birth of the grandson, he was esteemed to die without issue living at the time of his death (the ten months, afterwards put in by statute, not being by common law allowed); but in both cases B. had issue, though not living at the time of his death—in one case a son, in the other a grandson, who might have indefinite issue; and the issue was thus indefinite upon whose failure it was held the limitation over to C. was to take effect, and hence an estate tail was the result, as above stated.

Now, the only effect of the ten months added by the statute is to characterize the son or grandson *en ventre sa mere* as living at the death of B., and to put such son or grandson in

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the same position he would have been in if he had been actually born, and not *en ventre sa mere,* at B.'s death.

Before this statute, if the courts had held that C. was to take if there was no issue of B. living at B.'s death, C. would have taken in exclusion of the son or grandson supposed above *en ventre sa mere.* Since that statute it is not possible that C. could take (if estates tail were allowed) while there is any descendant of B. *en ventre sa mere* at the time of B.'s death (for all children are born within ten months). Now, if B. has issue living at his death, or born within ten months thereafter, such issue takes a fee simple, and the limitation over is void. If B. dies without issue living at the time of his death, or born within ten months thereafter, C. takes, unless A. plainly says in his will he does not mean C. to take while B. has any descendants living; and in this case (and in this case as in an estate tail that is created by the will) the statute converts it into a fee simple in B. himself, who may sell it, and cut out his heirs, the objects of the devisor's bounty. The difference is this: If the devisor does not plainly declare in the will that he never means C. to take while B. has any descendants living, the words "die without issue" mean "die without issue living at his (B.'s) death, or born in ten months thereafter," and the result is a life estate to B. and a fee simple, by way of executory devise, to B.'s issue living at his death, or born in ten months thereafter. The grandchildren (or other descendants) are protected, and the devisor's intention effectuated as far as it can be. If B. has no such issue when he dies, C. takes, and this carries out also the devisor's intention. But if A. does so plainly declare, then he attempts to create an estate tail, which (as the result of his ignorance of the law) is a fee simple in B., and his intention is defeated.

Statutes changing this old construction are of two kinds—those, like that of New York, which imperatively say in the case supposed that the words mean "die without issue living at

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the time of his death, or born in ten months thereafter;" and, second, those, like ours, which merely change the presumption, and shift the burden of proving that A. meant an indefinite failure of issue upon A. by making him so declare in his will. The old construction never obtained in Ohio (American L. C. R. P., p. 490), and in Georgia it is held that it was an erroneous construction of the statute *de donis* by the English courts, in harmony with their peculiar rules of property, primogeniture, estates tail, etc. English courts construe according to their customs; American courts should favor executory devises to carry out the intent. "Heirs" or "issue" may be so used as to mean "children," in which cases the statute does not apply, is unnecessary, and a definite failure is intended; and so where devise over is on the death of B. without issue, before a certain person dies, etc., or where it is if B. dies unmarried and without issue, the limitation is defeated even if B. marries and has issue; or where the devise is that on the death of the first taker, B., without issue, the executors of devisor shall sell, etc., the failure meant is indefinite, and the limitation fails. See Williams on Real Property, p. 214; and Leading Cases on American Law of Real Property, Sharswood & Budd, vol. 2, p. 489, *et seq.*

Returning from this discussion of the history and reason of § 1202, Rev. Code 1880, we find ourselves advanced thus far in the construction of this deed: (1) It is clear that Eldon C. Field is not to be counted as one of the donees within whose life the ultimate fee must vest. (2) That under sec. 4 of the deed Bate and Harry took fees determinable upon the contingency of their dying without issue living at the time of their respective deaths. (3) In case they should so die, the ultimate fee was limited over to J. Harris Field, Sr.

The remaining question to consider in determining the validity of the limitation over to J. Harris Field, Sr., is whether, under § 1190, Rev. Code 1880, this limitation over of the ulti-

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mate fee to J. Harris Field, Sr., specifically, is one that may be validly made, in lieu of one to the right heirs of the donor, generally, without specification. J. Harris Field, Sr., was the right heir of the donor. Bate and Harry both died without issue living at the time of their respective deaths. There were, therefore, no heirs of the body of the remainderman. Bate and Harry would both have an estate of an undivided half interest in a determinable fee upon the death of Eldon C. Field, with cross-remainders between them, in favor of the survivor of them; and in case of the death of both without issue there was a limitation over of the ultimate fee to J. Harris Field, Sr. Bate Field and, *mutatis mutandis*, J. Harris Field, Jr., would each be donee of that half interest. Then upon the death of either without issue living at the time of the death, the survivor would take the half interest of the one so dying. This survivor would be, as to his or her original half interest, a *second* donee, and there would then remain the limitation over to J. Harris Field, Sr., who was the heir at law of the grantor. As to the original half interest held by the survivor, J. Harris Field, Sr., would be the *second* donee; and as to the half interest accrued to the survivor, J. Harris Field, Sr., would claim as being—expressly within the language of the statute—the heir at law of the donor, there being a default of heirs of the remainderman.

It is very ingeniously and ably argued for appellant, in opposition to the validity of this limitation over to J. Harris Field, Sr.: (1) That under § 1190, Rev. Code 1880, the limitation to the right heirs of the donor must be to them generally, and not specifically to one of them; and that no such limitation over any third person can be made in lieu of a limitation to heirs of the body of the remainderman. (2) That the words "any person may make a conveyance or a devise of lands to a succession of donees then living, not exceeding two, and to the heirs of the body of the remainderman, and, in default thereof, to the right heirs of the donor," mean that the words

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"and to the heirs of the body of the remainderman" were applicable *alone* to a *devise,* and not to a *deed.* (3) That the words "to the right heirs of the donor in fee simple" mean that the estate is to go to the heirs of the donor by *descent,* and not by *purchase,* by operation of the terms of the deed. (4) That sec. 1190 does more than the rule against perpetuities did—to wit, that it declares not *only* when the ultimate fee must vest, but the *number* of those to whom precedent estates may be limited; and since, as contended, a valid limitation of the ultimate fee could not be made to J. Harris Field, Sr., in lieu of the heirs of the remainderman, J. Harris Field, Sr., is to be treated as a *third limitee* in *number,* and hence that the limitation is to be declared void as too remote.

In answer to the first proposition, it is to be said that in *Busby* v. *Rhodes,* 58 Miss., 240, and *Cannon* v. *Barry,* 59 Miss., 299, and *Halsey* v. *Gee,* 79 Miss., 193 (30 South., 604), this court has expressly held that a limitation over to a *specific* person, *being one of the right heirs of the donor,* is valid; and in this same connection it is enough to say in regard to the fourth proposition above that this court has held in *Jordan* v. *Roach,* 32 Miss., 620, and *Cannon* v. *Barry,* 59 Miss., 299, that the object of this statute is to specify a *time limit* beyond which the grantor cannot go, but *within* which he can exercise unbounded discretion; that the purpose of the statute was to prescribe a *limit of time* beyond which the vesting of the estate in fee could not be suspended; that the lives of the two donees in being were the measure of time within which the ultimate fee must vest—in other words, that the statute prescribed a *limit of time,* and not a *formula of conveyancing.* In answer to the second proposition above stated, we have only to point to the express language of the statute, § 1190, Rev. Code 1880: "Any person may make a *conveyance* or a devise," etc., "TO a succession of donees," etc., "and TO the heirs," etc., "and in default thereof TO the right heirs of the donor." And as to the third

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proposition above set out, the conclusive reply is that in *Busby* v. *Rhodes* and *Halsey* v. *Gee* and *Cannon* v. *Barry, supra,* this court has expressly held that the right heirs of the donor took by *purchase,* and not by *descent;* as *limitees* under the terms of the deed or will, and *not* as *heirs.* It is further to be remarked that many legislatures have met between *Jordan* v. *Roach* and *Halsey* v. *Gee,* and several codes of law have been adopted in that time; and yet this statute, with these terms in it, has remained through all these years, with the above construction put upon it, unchanged. If anything can have become, in the most solemn form, a rule of property, the construction put upon this statute is certainly such a rule; and it is far too late now to seek to overturn that rule. It is specially to be noted further that, if it had been the legislative purpose that the right heirs of the donor were to take by *descent* as *heirs,* apt words to express that purpose could easily have been used—as, for example, "to revert to the heirs of the donor;" whereas, on the contrary, this statute repeats and repeats the word "to," as pointed out above: "to donees," "to heirs of the body," "to the right heirs of the donor." It expressly declares that conveyances or devises can be made to these various categories of persons. It confers a *power* in derogation of the first clause of the section, and expressly designates the person to whom such deeds or devises can be made. It would be utterly incongruous to use the words, "conveyance to," in speaking of title cast by descent. Let it be noted again that the changed language of the act of 1822 (Hutch. Code, p. 609, sec. 24), by the code of 1857, ch. 36, art. 3, whereby the words, "to the heirs of the body of the remainderman," were substituted for the words, "*the heir or* heirs of the body of the remainderman," demonstrates that "heirs of the body," in this clause, were referred to as *purchasers;* and this was expressly so held in *Jordan* v. *Roach,* where the court say: "Whatever interest the donor or devisor may choose to give to the remainderman, where the

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estate is conveyed to a succession of donees, with a limitation over to the heirs of his body, it is certain it cannot be an estate of inheritance, as the heirs of the body of the remainderman must take, if they take at all, as purchasers, and not as heirs." No just distinction can be drawn between the language of the statute in the clause between the words, "to heirs of the body," and "to the right heirs of the donor." They are alternatives of each other. If there be no heirs of the body of the remainderman, the right heirs of the donor are held to take as purchasers.

We are, therefore, of the opinion that the limitation over of the ultimate fee to J. Harris Field, Sr., one of the right heirs of the donor, is by the express terms of the statute, and in accordance with the uniform decisions of this court, a valid limitation. It may be confessed that, as insisted by counsel for appellee, the original of this statute (sec. 1190) is obscurely drawn, and that the "original draftsman of the statute had no conception of his own meaning, or of the common-law rules he was displacing;" and the incongruity of dealing, in the same section, with the subjects of fee tail and the rule against perpetuities, is obvious. From this fact follows, doubtless, the difficulty of harmonizing in all respects the decisions of this court in the construction of this statute. The court did not make the statute. It had to deal with it as best it could, being made; just as the court, in *Jordan* v. *Roach, supra,* had to treat the act of the 13th of June, 1822, concerning conveyances, as being one expressly intended to abolish estates tail, which the legislature supposed were sanctioned by the law at that time, although the whole doctrine in regard to estates tail and executory devises (which were ingrafted by the English courts upon the statutes of Westminster II, 13 Edward I, called the "Statute de Donis Conditionalibus," and the Statute of Wills, 32 Henry VIII) never had any existence in this state by any express or positive legislative enactment. All the statutes of England not reënacted in

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Mississippi were, in the year 1807, excluded from operation within the territory of Mississippi. Hutch. Dig., 65. And neither of the two statutes referred to was in force in Mississippi when the act of 1822 was passed, and yet the legislature passed that act supposing they were in force. This court has had to deal with the act of 1822, and with the original of this sec. 1190, as best it could, conceding the obscurity and confusion resulting from the ignorance of the draftsmen. It may further be conceded that it would have been wiser if this court had originally construed this statute, as intended, as a substitute for all common-law rules to which its provisions can apply, instead of as merely amendatory of the common law; but for us it must be enough that the long line of contrary decisions has become now crystallized into a rule of property. It may also be conceded as a sound original proposition that, since the term of twenty-one years and the ordinary period of gestation —ten months—were added to the term of any number of lives in being, first, as a time added in the event of the minority of the last taker, because, during such minority, he could not alien the estate, and because, second, this extended the period of the rule, and was afterwards added to it as a fixed time without regard to minority, therefore, our statute (said sec. 1190) cannot have the period of twenty-one years and ten months added to it, since it fixes by its own terms the time limit within which the ultimate fee must vest. Certainly it seems true that at the time of the passage of our act of 1822, *supra,* dealing with this subject, the addition of the period of twenty-one years and ten months as a gross term, regardless of minority, was not allowed in the courts of England themselves. In *Loyd* v. *Carew,* Show, P. C. 107, decided in 1698, it was held that a period of one year might be added to lives in being, because no inconvenience could result therefrom. In *Beard* v. *Weatcott,* 5 Taunton, 393, thrice argued, it was held that the gross term of 21 years could not be added. This was decided in 1810.

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Gray on Perp., sec. 184. And it was not until the decision in *Cadell* v. *Palmer,* 1 Cl. & F., 411, in 1832, that the rule as now established was finally settled in England—a period of ten years after the adoption of our act of 1822. But whilst that might have been the better holding originally, the direct contrary has been held in *Cannon* v. *Barry,* 59 Miss., 289, and *Caldwell* v. *Willis,* 57 Miss., 555, and, therefore, this principle has become a rule of property not to be overturned.

It will be observed that I have confined this opinion to a ground not touched in the former opinion of this court. *Field* v. *Banking Co.,* 77 Miss., 180 (26 South., 365).

We cannot conclude this opinion without acknowledging our indebtedness to the briefs of counsel on both sides, which are marvels of profound learning, searching analysis, and clear reasoning.

It follows from these views that the decree in the court below must be, and is hereby, reversed, and the bill dismissed.

CALHOON, J. (concurring).

The deed puts the legal title in J. Harris Field, Sr., to take effect on the death of Eldon C. Field, the grantor, as trustee of an active trust for Bate Field and J. H. Field, Jr., to last during the life of the trustee, who is to have one-third of the usufruct as compensation; and if he should die in the lifetime of Bate Field, the title goes to her for herself and J. H. Field, Jr., they to share the usufruct; and on the death of either without issue of the body the other is to have the whole estate, subject to the rights of J. H. Field, Sr.; and on the death without issue of the survivor of the two, Bate and J. H. Field, Jr., it is to go to J. Harris Field, Sr., or, if he be then dead, to his heirs. Eldon C. Field, the grantor, is, of course, not to be counted as a limitee, because he is a grantor, and the estate really remains his until his death. The only question is whether, under the statute, the ulterior limitee after the last of the two donees who

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take in succession must be an *heir of the body* of such last donee, or may some other be such limitee? Rev. Code 1880, § 1190; Code 1892, § 2436. The solution depends on whether the statute is to be regarded as prescribing the exact *terms* in which the limitation it authorizes may be created, or whether it is to be interpreted as fixing a period *measured by lives* beyond which the ulterior limitation must not vest, and not designating "heirs of the body" as the *only* authorized limitees to take after the last of two donees. It seems plain that the statute forbids fees tail by converting them into fee simple, and authorizes the creation of estates to be enjoyed in succession by not exceeding two persons, with remainder to the heirs of the body of the last taker, and, if there are no such heirs, to go to the heirs of the creator of the estate. No doubt the lawmakers had in mind executory devises, and, having abolished fees tail, authorized the creation of the estates described in the statute to which this limitation must conform. Executory devises no doubt furnished the idea of lives in being, but succession of donees had no place in the law of executory devises. It seems plain that it could not have been the purpose to interfere with *executory devises,* but that, having effectually destroyed fees tail, it was intended to authorize, as a substitute therefor, the succession of interests authorized by the proviso, so as to enable one to give an estate to his wife and children, or others, in succession, with remainder to the heirs of the body of the last taker, and, if none, to go to the heirs generally of the donor. If the effect of the statute is to prescribe the *precise terms in* which an estate may be limited to persons in succession, the ulterior limitee must be "heirs of the body" of the last taker. In this view heirs not of the body cannot take, because the statute says "heirs of the body." The original act said "heir or heirs of the body," and did not limit the number who might take in succession. Hutch. Code, p. 609, sec. 24. In 1857 the change to the present provision was made. Code 1857, p. 307, ch. 36, art. 3. Execu-

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tory devises were not required to be to a *succession* of donees. They might be limited on any number of lives in being, none of which had any interest in the estate limited on them, and so it seems the statute evinces no purpose to affect executory devises, but, having effectually prohibited fees tail, really designed to permit the sort of devolution of property in land provided for in the proviso. Should the idea prevail that no future limitation of land can be made except as prescribed by the very words of the proviso, while *personalty is* subject to the former law of executory devises? In *Cannon* v. *Barry,* 59 Miss., 289, it was announced that a statute was not intended to *prescribe a formula to* be adhered to in future limitations. The estate contemplated by the proviso is so widely different from executory devises that they could not have been had in view in enacting it except as furnishing the idea of lives in being. The statute prohibited fees tail, and authorized a statutory substitute for them, and left executory devises wholly unaffected. The statute, in its real meaning, says: "There shall be no fees tail—*i. e.,* you shall not tie up land by limiting it to heirs of the body generally or specially—but you *may give* it in succession to persons then living, not exceeding two, and the heirs of the body of the survivor of these two." The original act was to serve the purpose of family settlement, and there was no limitation of the number of successive owners, thus enabling one to limit in succession *all* his children or other persons. The code of 1857 cut the number of successive donees down to two, and thus defeated to some extent the purpose of the original act. *Cannon* v. *Barry,* 59 Miss., 289, was decided in 1881, and I do not think it right to disturb the finding of the very able court in that case in a matter so important to property rights. Too many legislatures have come and gone without interference with the conclusions in that case.

I am in accord with the opinion of the Chief Justice on the law, and also in the concurring opinion, on the facts, by Judge TRULY.

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Specially concurring opinion.

TRULY, J. (specially concurring).

Reviewing the facts of this case in the light of a completed record, taking into consideration the proof adduced before and after the remand of the case by this court, passing upon the acts of the parties in the light of their environment at the time, the conclusion that the compromise of the 21st of November, 1896, was fairly entered into, is valid, and should be upheld, is irresistible and inescapable. However it may have appeared in the dim, uncertain light of the incomplete record before the court upon the former hearing, a candid and impartial examination of the record now presented demonstrates that Bate Field acted with full knowledge of all her rights in the premises, and, in view of the many legal obstacles in her path, it cannot be said that she decided unwisely in accepting the compromise offered as the result of some days' negotiation. In passing on her actions at the time, it is not amiss to narrate briefly her surroundings and the past events which led up to and culminated in the execution of the compromise deed. The photograph of Miss Bate Field, as shown by the record, is this: A young lady twenty-one years of age, educated, cultured, traveled; so capable and intelligent that at nineteen her parents deemed her competent to transact her own business affairs, and upon their petition her disabilities of minority were by the chancery court removed. She had been familiar with the protracted litigation almost from the day of its inception. She was present at, and understood, repeated conversations between E. C. Field, her uncle; Sarah M. Field, her mother, and their lawyers. The answer filed to one of the bills of complaint is confessedly in her own handwriting, and in this answer the theory of the defense is set forth with wealth of detail, and the trust deed of August 30, 1890, specifically referred to, and her claim of title based on its provisions. She had been kept posted by letters of counsel, forwarded to her by her mother, of the various plans by which it was hoped victory could be snatched from the jaws

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of defeat. She had been advised of the ebb and flow of their hopes of success, and knew that these had receded and left her ship of promise stranded. She had learned through the letters of that attorney, dated July 8, September 7 and 14, 1896, how desperate was the chance of success. Possessing this information, she, with her mother and brother, went to the conference which resulted in the compromise. The record shows further that the attorneys who represented her were vigilant and faithful in the discharge of their duty in guarding her interest. We find that they had diagnosed the case with great acumen and professional skill. On July 8, 1896 (four months before the compromise), in a letter to Mrs. Sarah M. Field, which was forwarded to Miss Bate Field, they had set out this diagnosis, pointed out the weaknesses of the case, and indicated the desperately slight chance of final recovery. Subsequently, on September 14th, we find one of the attorneys writing that his greatest fears had been realized; that "they have sworn us clear out of court," as the witness had testified "as we feared he would do;" whereupon, despairing of final success, but still faithful to their client, seeking to save something from the wreck, her attorneys broached the subject of a compromise to the attorneys of the Middlesex Banking Company, and, when this had culminated in the submission of a definite proposition, summoned their client to a conference. It is impossible, in my judgment, to read this record, and follow this case through all its manifold and devious changes, without being convinced that the attorneys who represented Bate Field not only acted with absolute fidelity to their client, but displayed rare skill in their efforts to save a case which appeared beyond the power of legal medicament. The letter of July 8, 1896, is incontrovertible evidence of the careful consideration which the writer had bestowed on the case. Its various phases are therein pointed out, the proposed plan of treatment indicated, and the legal complications which might arise clearly stated. It should be

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noted also that this compromise was not of the seeking of the Middlesex Banking Company. The attorneys for Bate, realizing the doubtfulness, if not hopelessness, of their cause, made the first approach, which, after several counter propositions, resulted in the offer which was finally accepted.

Coming now to the occasion on which the compromise was formally closed and the deed in pursuance thereof executed, we find that Bate Field was fully posted as to all past details of the litigation, with full information of all material facts; that she had a long consultation with her attorneys, who, being themselves informed in the premises, went over in detail every theory of the case, and made disclosures of all the material facts bearing on the case. Again, it is disclosed that Bate Field was not pressed for an acceptance of the offered compromise. On the contrary, after mature reflection, she decided to accept the offer, and therefore, when the attorneys for Middlesex Banking Company endeavored to end the negotiations, and withdrew the offer of compromise on account of a doubt which arose as to her age, objection was made on her behalf by her counsel, and Mrs. Sarah M. Field, her mother, by affidavit supplied the proof that Bate Field had attained her majority, which proof enabled her to acceptably execute the compromise deed. After execution the deed was retained in her possession for several days before counsel for appellant finally concluded to accept the deed and pay the sum agreed on.

Here, then, is the scene, and these the actors in the drama, as they are portrayed by the completed record of the cause: A young lady, intelligent, competent, fully informed, advised by shrewd and faithful counsel devoted to her interest and learned in the law, with no concealment on the part of any one, granted ample time for reflection and examination, who, after full discussion, enters into a compromise, and by so doing obtains money, of which, at that very time, according to her own story, she stood in pressing need. She was not pressed for an accept-

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ance of the offer made, but she, her mother, and her attorneys insisted on appellant carrying the compromise into effect. To hold a settlement of a pending, doubtful litigation consummated under such circumstances invalid would be to overturn the firmly established principle of law which encourages compromises, and would set at defiance repeated adjudications of this and other courts. We adhere to its fullest extent to the doctrine that a court of conscience will protect the ignorant or unwary from fraud, unconscionable imposition, or oppression. But this is not the case. Capable of contracting, fully informed, advised of her rights and her prospects, counseled by attorneys of unblemished character and of unquestioned ability, after full and calm deliberation, Bate Field converts her chances of future success into ready cash. Such a transaction is supported by every principle of law and justice and right. The compromise by Bate Field being valid, appellee has no right of action.

As this is decisive of the case, I have not deemed it necessary and do not now pronounce any conclusion as to the validity or construction of the trust deed of August 30, 1890.

I concur specially in the result.

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Syllabus.

LAURA L. OWENS, EXECUTRIX, ET AL. *v.* ESTATE OF SILAS OWENS, DECEASED.

1. EXECUTORS. *Accounting. Representative of deceased executor. New party.*

Where a suit is begun by a distributee of an estate to compel an accounting by a surviving executor it is proper, on application of the survivor, to make the personal representative of the deceased executor a party to the proceeding.

2. SAME. *Depositions. New party.*

In such case depositions taken before the representative of the deceased executor was made a party are admissible.

3. SAME. *Appeal. Questions reviewable.*

In such case, upon appeal, the supreme court will not review matters which the court below expressly declined to pass upon, reserving the same for decision on fuller proof, nor will an assignment of error be considered which seeks to review the action of the court below holding an executor chargeable with a bond where after the appeal was taken the bond was accounted for by the executor.

4. SAME. *Executors charged with interest.*

Where executors collected money belonging to the estate, and rendered no accounts for more than two years, deposited the money in their own bank credited to them as guardians of the distributees, when they were not guardians, and the money so remained in the bank for ten years, the bank in the meantime loaning money to the distributees at interest and selling property to them, taking interest-bearing notes therefor, they are chargeable with interest at the legal rate during the time the money was in the bank.

5. SAME.

Where executors, without excuse, left a sum due the estate in the hands of the debtor for nearly fifteen years, not collecting it till compelled to do so in a proceeding for an accounting, they were chargeable with interest on the amount.

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Statement of the case.

6. SAME. *Commissions. Donation. Return to estate.*

Where it appeared that an executor intended to return his commissions to the estate, it was improper to treat such intention as a donation to a part of the distributees, as each of the distributees was entitled to share therein.

FROM the chancery court of Lafayette county.

HON. JAMES C. LONGSTREET, Chancellor.

Silas Owens died in 1889, leaving a will. He left an estate of about $100,000. In his will he devised and bequeathed all his property except $5,000, which he bequeathed to the lady he afterwards married, to his four children. At the time of the execution of this will he was a widower, but afterwards married, and had two more children by this last marriage. He appointed A. T. Owens and Bem Price executors of his will. The will provided that, when any of said children should marry or become of age, their share of the estate should be paid over to them. The will was probated and the executors qualified. The executors proceeded with the execution of the trust, and filed their first annual account at the May, 1892, term of the chancery court, which was approved. At that time $80,500 was distributed, and the court, on the application of Bem Price, allowed the executors commissions at five per cent on that amount. When A. T. Owens learned this, he at once got an attorney to get the amount of the commissions reduced to four per cent, and declined to receive any commissions at all, but Price was paid his half of the commissions so allowed. After the death of Silas Owens, his widow renounced the will, and took as one of the distributees, under the law. After the first account filed, A. T. Owens had very little to do with the management of the estate, and he died in May, 1897, and his widow, Mrs. Laura L. Owens, was made his executrix. Silas Owens had also an estate in North Carolina, and Bem Price took out letters of administration c. t. a. in that state, and received from that source $20,346.75. In October, 1900, Mrs. Erma Nicholson, one of the daughters and heirs of Silas Owens, filed her

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Statement of the case.

petition in the chancery court of Lafayette county, asking that Bem Price, the surviving executor, be required to render a final account. Price filed his final account. To this final account the heirs of Silas Owens filed a number of exceptions, and the depositions of several witnesses were taken. Price then took steps to bring in the representatives of A. T. Owens, deceased executor, in order that they might be held partly responsible in the event the decree should be in favor of parties excepting to his final account, and the said representatives were brought in after the depositions had been taken. The exceptions to the final account urged by the heirs of Silas Owens are as follows: (1) They urge the court to charge against the executors the par value of $5,000, and the interest thereon, of stock held by Silas Owens at the time of his death, in the Bank of Greenville, which the executors had allowed to perish through the insolvency of that bank. (2) The executors should be charged with $500 and interest, being the value of one Bedford Alum & Iron Company bond owned by Silas Owens, and lost by the neglect of the executors. (3) The executors should be charged with interest on moneys received by them on account of Silas Owens' estate, and held for many years without any reason therefor. (4) The executors should be charged with certain rents on a tract of land known as the "Wiley Hood Place," because of their gross negligence in not realizing the rents. (5) The executors should be charged with interest on the money in the hands of Latham, Alexander & Co., which was permitted to remain uncollected for fifteen years. (6) The court should refuse to allow commissions to the executors, and it should require Price and the estate of A. T. Owens to be charged back with commissions already received, because of the gross neglect of duty and the improper allowance of the commissions. (7) The court should refuse to allow any attorney's fees, as the services of attorneys were required by Price's neglect and for his personal defense, and not to protect the interest of the estate. The cause was heard on considerable testimony, and a final decree

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Brief for appellants.

was rendered to the effect that the par value of the Greenville stock and the interest thereon should be charged against the executors and the value of the Alum & Iron bond. The other objections were overruled. From that decree the surviving executor appealed. The heirs of Silas Owens prosecute a cross appeal, and Mrs. Laura L. Owens, executrix of the estate of A. T. Owens, also appeals. The opinion of the court contains a statement of such other facts as are necessary for an understanding of the case.

C. L. Sivley, Stone & Wilson, and *Holmes & Holmes,* for appellants.

The two assignments of error relied on are that the court erred in charging the executors with the bank stock and with interest thereon. Executors are not held to the same degree of care where the investment was made by the testator as if made by themselves, unless they are required by law to change the securities made by the testator. In this state there is no such law. In such case they are not liable for loss, except where they act in bad faith or in an unreasonable manner. *Hogan* v. *De Peyster,* 20 Barb., 115. All that is required is ordinary care. *Williams, Adm'r,* v. *Campbell,* 46 Miss., 61; *Coffin* v. *Bramlitt,* 42 Miss., 208 (97 Am. Dec., 449); *Harvard College* v. *Amory,* 9 Pick., 446; *Brown* v. *French,* 125 Mass., 410 (28 Am. Rep., 254); *Torrence* v. *Davidson,* 92 N. C., 441 (53 Am. Rep., 419); Eyster's Appeal, 16 Pa., 372; Woerner's Am. Law of Administration, vol. 2, p. 708; *Thompson* v. *Brown,* 5 Johns. Ch., 619. Not held responsible for losses occasioned by mere error of judgment. *Cooper* v. *Cooper's Ex'r,* 77 Va., 198; *Corrington* v. *Corrington,* 15 Ill. App., 393. Where he has acted with what men of sense and experience would deem reasonable discretion in their own affairs, especially during a period of doubts and difficulties, he will not be held for losses arising in consequence of his acts in good faith. *Perry* v. *Smoot,* 23 Grat., 241; *Pope* v. *Mathews,* 18 S. C., 444; Woerner's Am. Law of Administration,

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Brief for appellants.

p. 10; *Bowker* v. *Pierce,* 130 Mass., 262; *Marsden* v. *Kent,* L. R. 5 Ch. D., 598. If the testator has given no directions in the will, the ordinary rules of prudence and diligence apply, and the fact that he has invested his property in particular stocks, shares of corporations, mortgages, or other securities, will go far to justify his executors in continuing them. *Harvard* v. *Amory, supra; Parker* v. *Glover,* 42 N. J. Eq., 559 (9 Atl., 217); *In re Weston's Estate,* 91 N. Y., 502; *Marsden* v. *Kent, supra.*

It is not enough to say that, in the light of subsequent developments, better judgment would have dictated differently. *Bowker* v. *Pierce,* 130 Mass., 262; *Pearson* v. *Gillenwaters* (Tenn. Sup.), 42 S. W., 9; *Foscue* v. *Lyon,* 55 Ala., 452.

These executors were, it is very evident, in doubt as to whether the stock was in peril of being lost. They evidently believed they could solve this doubt by waiting, with safety, and in this they were mistaken. They had a right to wait and to take advice, and they delayed a little too long without knowing it. They are not responsible. 2 Woerner's Am. Law of Administration, 710; *Matter of Gray,* 27 Hun., 455; *In re Weston's Estate,* 91 N. Y., 502; *Troup* v. *Rice,* 55 Miss., 278.

Under Code 1880, §§ 2032 and 2038, they only had a right to sell perishable property. This stock was neither perishable property nor property needed to pay debts, and an order of court was necessary, and this would require two weeks' notice. The sale would perhaps not have been void without this notice, but the purchasers would have required it, and the trustees needed the notice to protect themselves. *Baines* v. *McGee,* 1 Smed. & M., 208 (1); *Joslin* v. *Caughlin,* 26 Miss., 134; *Hutchins* v. *Brooks,* 31 Miss., 430; *Bland* v. *Muncaster,* 24 Miss., 62 (57 Am. Dec., 162); *Smith* v. *Chew,* 35 Miss., 153.

In the court below cross-appellants laid great stress on the fact that Price was a director in the Bank of Greenville. An individual director is not, by virtue of his office, charged with knowledge of what appears on the books, and is not, as matter

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Brief for appellees.

of law, conclusively presumed to know the general business of the corporation. Thompson on Corporations, vol. 4, sec. 4607; *Bank* v. *Drake,* 29 Kan., 311 (44 Am. St. Rep., 646); Cyc. Law & Proc., vol. 10, p. 826, sec. 10; *Rudd* v. *Robinson,* 126 N. Y., 500 (26 N. E., 1046; 12 L. R. A., 473; 22 Am. St. Rep., 816); *Briggs* v. *Spaulding,* 141 U. S., 132 (11 Sup. Ct., 924; 35 L. ed., 662).

Even if they should have been charged with this stock, they should not have been charged with interest on it. 1 Perry on Trusts, sec. 466; *Losen* v. *Copland,* 2 Bro. Ch., 157.

Kimbrough & Kimbrough, for appellees.

The executors are plaintiffs, and must prove the facts that relieve them from liability. *Cole* v. *Leake,* 27 Miss., 767; *Gray* v. *Harris,* 43 Miss., 427; *Tell City Furniture Co.* v. *Stiles,* 60 Miss., 857; *Morgan* v. *Stone,* 65 Miss., 250 (3 South., 580). The executors stand charged with entire estate as inventoried, and must show a legal administration to relieve them from liability. *Bohannon* v. *Madison,* 31 Miss., 350; *Moffatt* v. *Loughridge,* 51 Miss., 214.

Executors may sell perishable property without order. Code 1892, § 1888. The court or clerk may order the sale. Sec. 1885. Depreciated bank notes are perishable property. It was the executor's duty to convert them into something less perishable. *Bailey* v. *Dilworth,* 10 Smed. & M., 410 (48 Am. Dec., 760). This rule has not been modified. *Bailey* v. *Dilworth,* 10 Smed. & M., 409 (48 Am. Dec., 760); *Bohannon* v. *Madison,* 31 Miss., 348; *Booyer* v. *Hodges,* 45 Miss., 78. Power to distribute implies power to sell. 2 Lawson's Rights, Remedies & Practice, secs. 922, 929, 935. They may sell and distribute personal property, and are responsible for loss from delay. 3 Waite, Act. & Def., p. 244, sec. 10; Jarman on Wills. If the bank stock is not perishable, the chancellor could have made an order in vacation. Code 1892, § 1886. But this was not an ordinary executor, but a trustee or guardian as well, and as

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Brief for appellees.

such took the absolute legal title, and could convey any part of it. Pom. Eq., secs. 1011, 1012; *Hale* v. *Hale* (Ill.), 33 N. E., 858 (20 L. R. A., 247); *Jones* v. *Railroad Co.* (Mass.), 23 N. E., 43 (5 L. R. A., 538). One executor may lease or dispose of the estate without the other. *Boudereau* v. *Montgomery,* Fed. Cas., No. 1694. Executor may be allowed loss on sale of stock, though sale was made without order of court. *Ex parte Jones,* Fed. Cas., No. 7443. Executor has legal title to choses in action, and, in absence of fraud, may dispose of them as if owner (*Butler* v. *Gazzam,* 81 Ala., 491 [1 South., 16]), and may make private sale in small lots when sale in large lots might depress market (Succession of Kaiser [La.], 20 South., 184).

Executor must use utmost good faith and such diligence as a prudent man exercises in his own affairs. *Boggan* v. *Walter,* 12 Smed. & M., 668; *Bailey* v. *Dilworth,* 10 Smed. & M., 404 (48 Am. Dec., 760); *Bohannon* v. *Madison,* 31 Miss., 348; *Conwill* v. *Livingston,* 61 Miss., 648. If property is lost, executor must show he used due care. *Boggan* v. *Walter,* 12 Smed. & M., 666; *Bailey* v. *Dilworth,* 10 Smed. & M., 409. An executor is not relieved by showing that the bank became insolvent. *Morgan* v. *Stone,* 65 Miss., 250 (3 South., 580); *Banks* v. *Machen,* 40 Miss., 260. To get credit must show that it was lost without his fault. Code 1892, § 1956; *Moffatt* v. *Loughridge,* 51 Miss., 214; Am. & Eng. Ency. Law (2d ed.), vol. 12, p. 887; *Cooper* v. *Williams* (Ind. Sup.), 9 N. E., 917. Must exercise sound discretion. Perry on Trusts, secs. 439, 441. When resort to court would delay, must act as owner. Perry on Trusts, sec. 476.

They are chargeable with interest "when it remains dead in their hands." *Anderson* v. *Gregg,* 44 Miss., 182 (11 Am. & Eng. Ency. Law [2d ed.], p. 1218, note 2, and p. 1220); *Banks* v. *Machen,* 40 Miss., 257; *Cason* v. *Cason,* 31 Miss., 579; *Brandon* v. *Hoggatt,* 32 Miss., 335, 340.

As to the rate of interest: Ordinarily, as to adults, 6 per cent compound interest is the most that could be charged; but

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Brief for appellees.

in this case 10 per cent is the actual damage done to the adults, and there is another reason that requires that 10 per cent be charged. The executors mingled these funds, or, rather, deposited them in a bank absolutely owned by these two executors, to the extent of not less than one-fourth of the whole of it at any time during the entire administration. *Powell* v. *Cooper,* 42 Miss., 226. The slightest gain out of the assets subject to his control when it cannot be traced, subjects him to interest on the whole. *Anderson* v. *Gregg,* 44 Miss., 182; *Allen* v. *Gillette,* 8 Sup. Ct., 1331 (32 L. ed., 278).

Executor depositing funds in a bank of which he is an officer or owner is liable for interest on that account. *In re Babcock* (Sur.), 9 N. Y. Supp., 554; *In re Mairs,* 4 Redf. Sur. (N. Y.), 160; *Clock* v. *Chadeagne,* 10 Hun. (N. Y.), 97; *Cannon* v. *Apperson,* 14 Lea (Tenn.), 553; *Johnson* v. *Holifield,* 82 Ala., 123 (2 South., 753). Where the executor is liable for a debt lost, he is chargeable with interest on it from the time he should have collected it. *Banks* v. *Machen,* 40 Miss., 256.

The will made these executors guardians. They understood they were such and sold real estate and bank stock as guardians. A testamentary guardian who accepts is liable to account, though he did not qualify. *Gregory* v. *Field,* 63 Miss., 323.

The surviving executor is liable for the whole. *Fonte* v. *Horton,* 36 Miss., 355, 375; *Boggan* v. *Walter,* 12 Smed. & M., 273; *Clark* v. *Clark,* 8 Paige, 152 (35 Am. Dec., 676); *Edmonds* v. *Crenshaw,* 14 Pet., 165 (10 L. ed., 402).

Edward Mayes, on the same side.

There was gross negligence as to stock in the Greenville bank belonging to Silas Owens' estate. The legal principles which control this branch of the case are well settled. *King* v. *Talbot,* 40 N. Y., 76-84; *Bailey* v. *Dilworth,* 10 Smed. & M., 404 (48 Am. Dec., 760); *Boggan* v. *Walter,* 12 Smed. & M., 666. The law will not tolerate or condone this sort of treatment by executors. *Mills* v. *Hoffman,* 26 Hun., 594 (11 Am. & Eng. Ency. Law, 997, 965, 967, 904).

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Brief for appellees.

It would be intolerable that these trustees should be allowed to postpone the interests of their estates to their own interests. *Brazier* v. *Clark,* 5 Pick., 96; *Boyd's Ex'rs* v. *Boyd's Heirs,* 3 Grat., 113.

The Greenville bank stock was inventoried at $5,000. It was perishable property. This particular term had been applied to a similar property. *Bailey* v. *Dilworth,* 10 Smed. & M., 404 (48 Am. Dec., 760). See, also, *Webster* v. *Pick,* 31 Conn., 495; *Middleton* v. *R. R. Co.,* 26 N. J. Eq., 269; *Millard's Adm'rs* v. *Hall,* 24 Ala., 209; *Fisk* v. *Spring,* 25 Hun., 367.

Independent of the statutory provisions and the general principles of law of executors, it was their duty to act in emergencies, and to give the estate the full benefit of their power and influence. Perry on Trusts, secs. 476, 427; *Phillips* v. *Phillips,* Freeman, Ch. (Eng.), 11 (11 Am. & Eng. Ency. Law, p. 965).

There was no error in charging them with interest on this stock. *Banks* v. *Machen,* 40 Miss., 256; *Crowder* v. *Shackleford,* 35 Miss., 321; *Cole* v. *Leake,* 27 Miss., 767; *Lowry* v. *McGee,* 3 Head (Tenn.), 270; *Miller* v. *Lux,* 100 Cal., 609 (34 Pac., 637; 11 Am. & Eng. Ency. Law, pp. 1224, 1230).

The most important point raised on the cross-appeal by the heirs of Silas Owens is to the effect that the court erred in refusing to charge the executors, especially Price, with interest on the balance of money in their hands, unnecessarily and unlawfully retained by them and used in the bank in which they were interested. As to the two accounts of the Mississippi administration and the North Carolina administration, the executors should have been charged 10 per cent interest on the average amounts on hand during the average period from September, 1890, to the day of final settlement. *Bass* v. *Chambliss,* 9 La. Ann., 376; *In re Hilliard,* 83 Cal., 423 (23 Pac., 393; 11 Am. & Eng. Ency. Law, pp. 1212, 1219, 1231); *Grant* v. *Spann,* 33 Miss., 134.

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Opinion of the court.

They are estopped to assert now that they were guardians, and liable to be held accountable as such. *Bibb* v. *McKinley,* 9 Port., 636; *Aldrich* v. *Willis,* 55 Cal., 81; *Davis* v. *Harkness,* 1 Gilman (Ill.), 173 (41 Am. Dec., 184); *Breeding* v. *Shinn,* 8 Ind., 125; *Patrick* v. *Woods,* 1 Bibb (Ky.), 223; *Burch* v. *State,* 4 Gill & J., 444; *Chaney* v. *Smallwood,* 1 Gill, 367; *Parmentier* v. *Phillips,* 4 N. C., 294; *Martin's Adm'r* v. *Fielder,* 82 Va., 455 (4 S. E., 602); *Bryan* v. *Walton,* 14 Ga., 185; *Hines* v. *Mullins,* 25 Ga., 696; *Portis* v. *Cummings,* 21 Tex., 265.

Argued orally by *J. C. Wilson,* for appellants, and by *B. F. Kimbrough,* for appellees.

WHITFIELD, C. J., delivered the opinion of the court.

We have given this case, in all its details, the most thorough and painstaking consideration. The principles which must control it are not new. They are well considered and have been long established. We shall refer to no authorities in the course of this opinion, for the reason that counsel on both sides have, in their briefs, collated the authorities applicable, in the most admirable manner; and we content ourselves with referring to those authorities, all of which we have carefully examined.

It is the facts of a case which make a case, and it is the testimony in this case which must bring into relief, clear and distinct, the conduct of these executors, as falling within or without the condemnation of the law. If we were to set out in detail the facts, the opinion would be unpardonable in its length, and would be a mere array of bits of testimony, making up the whole outline of the case. We shall announce the conclusions at which we have arrived with only such comments as may be necessary to make clear what we mean.

There are three appeals before us. The first we shall deal with is the appeal of Mrs. Laura L. Owens, executrix of A. T. Owens, deceased. Four errors are assigned; the first being

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that the court erred in making Mrs. Owens, as executrix, a party to this proceeding, upon the petition of Price, surviving executor of Silas Owens. There was no error in this. It was eminently proper that the executrix should have been made a party for the purpose indicated in the decree below. Nor is there any error in the second assignment, which complains of the action of the court in allowing the depositions which had been taken in the case before Laura L. Owens, executrix, was made a party to be used. A. T. Owens was one of the executors. A. T. Owens was practically a party to the suit at all times, and no objection was made in the court below to the depositions. The fourth assignment of error is to the action of the court below in adjudging the estate of A. T. Owens liable for the Alum & Iron bond. This assignment is immaterial, since the executors have collected the full value of the bond and accounted for it since the appeal was taken from the decree below. The third assignment of error will be dealt with in connection with the assignment of error on the direct appeal. Coming to that appeal now, we find two assignments of error. It is assigned for error, first, on the direct appeal by the Memphis Trust Company, executor of the last will and testament of Bem Price, deceased, that the court below erred in charging the said Price and the said A. T. Owens with the par value of $5,000 of stock held by Silas Owens, Jr., in the Bank of Greenville, Miss.; secondly, the court below erred in charging the said executors with six per cent interest per annum on said sum of $5,000 from January 1, 1891, or with any interest whatever thereon before the entry of the decree below. It is enough to say that the testimony in this case makes it perfectly clear that the action of the court below in these respects was correct. We forbear detailed comment on the testimony. It follows that the decree on the direct appeal, and also the decree on the appeal of Mrs. Laura L. Owens, executrix, must be, and are hereby, affirmed.

The third appeal is that taken by the heirs of Silas Owens,

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deceased, as cross-appellants. They filed eighteen exceptions to the final account of the executors in the court below. They file only seven assignments of error here. The action of the court below in respect to the second exception is not assigned as error. The third exception relates to the failure of the executors to dispose of a certain Alum & Iron bond; but this, as stated above, is immaterial, since the executors have accounted for the same since the decree in the court below. The seventh and eighth exceptions were withdrawn by the exceptants. The tenth and eleventh exceptions are very full, and specific protests against the allowance of commissions at four per cent on $80,500 alleged to have been improperly allowed, and also protests against the allowance of any other commissions on the final account. It is sufficient to say as to these exceptions, as well as to the fifth assignment of error, which protests against the allowance of any attorney's fees in this proceeding, that the court below, in its final decree, expressly declined to pass upon these three matters, reserving them for decision after fuller proof should have been made. We have before us, therefore, as to these three matters, no action of the chancellor to review. The thirteenth exception was withdrawn, and the action of the court below on the fourteenth, fifteenth, sixteenth, seventeenth, and eighteenth exceptions is not assigned here for error. This leaves for our consideration on this cross-appeal the action of the court below on the fourth, fifth, sixth, ninth, and twelfth exceptions, as also its action, challenged by the seventh assignment of error, in directing that the commissions allowed by the chancellor, which were received by A. T. Owens, and then refunded to the heirs, should be paid back to the estate of A. T. Owens. The cross-appellants have reduced their complaints to seven assignments of error, which are as follows: "(1) The court erred in failing to charge the executors with interest on moneys received by them for said estate, and held for many years, without any reason whatever, as shown by the proof, for not distributing same. (2) The court erred in failing to

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charge said executors for reasonable additional rents on the Wiley Hood place, in Bolivar county, not realized only because of their gross negligence, as shown by the proof. (3) The court erred in failing to charge executors interest on money shown by their inventory to be with Latham, Alexander & Co., of New York—so in their personal knowledge—and which they permitted to remain there some fifteen years, and collected only after this proceeding against them was begun for settlement. (4) The court erred in not refusing commissions to executors, and in faling to charge Price with commissions already received, as same had been forfeited by gross neglect of duty, and was improperly allowed. (5) The court erred in not refusing the allowance of any attorney's fees for this proceeding, as the services of attorneys are required by Price's neglect, and for his personal defense, and not to protect any interest of the estate. (6) The court erred in the amount of its allowance for the Alum & Iron bond, and more has been collected on it than allowed, but only since the decree. (7) The court erred in directing in said final decree that the commissions allowed by Chancellor Trigg, which were received by A. T. Owens, and then refunded by him to the several heirs, should be paid back to the estate of A. T. Owens."

Taking up these in their order, we say that the first assignment is well taken. Silas Owens died in August, 1889, and these two executors qualified on the 20th of September, 1889. Price, one of the executors, took out letters of administration c. t. a. in North Carolina, and ultimately received from that source some $20,000. On the 6th of February, 1890, the executors filed their inventory of stocks, bonds, and notes, which aggregated $83,291.09. The executors proceeded with the management of the estate, but transacted very little of the business through the proper medium, the chancery court. Each year application would be made to the chancellor to allow a sum to be expended for the support of the children, and this was, in the main, everything that these executors did through the

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chancery court. It is proper to say that Price had the almost exclusive active management and control of this estate, A. T. Owens having apparently left everything to his judgment and management. Some minor orders were obtained at different times, but substantially all that they asked the chancery court for were orders authorizing the spending of yearly sums of money for the support of the heirs. Although the will was admitted to probate on the 20th of September, 1889, the first annual account was not filed until the 21st of February, 1892, and this was the only annual account that was ever filed. It was not until Mrs. Nicholson, one of the daughters, who had married in the meantime, filed her petition in the chancery court, on the 26th of October, 1900, more than eleven years after the will was probated, that any further account was rendered to the court, and this account—the final account—was thus rendered under compulsion, the prayer of that petition being that the court would compel Price, the surviving executor, to then render his final account, A. T. Owens having died before the petition was filed; and it was as the result of this compulsory process that the final account now before us was filed. Supplements to this final account were filed afterwards.

It is important to remember in this connection that A. T. Owens was president of the Bank of Oxford, and that Bem Price was cashier and active manager, and that both were large stockholders in the bank, and that Silas Owens during his life was the largest stockholder in the bank. As soon as Price collected the $20,000 from the North Carolina property, he brought it to Oxford, and put it into the Bank of Oxford. In the month of February, 1892, the executors filed their first annual account, and then distributed amongst the heirs some eighty odd thousand dollars, consisting chiefly of stocks, and partly of cash on hand—that is to say, the money was represented as distributed, but in fact none was paid out to the minor heirs, but it was still kept in the bank, where these executors passed the money to the credit of themselves as guardians of

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four of the minor children. As to this money, clearly, there was simply a transferring from one account to another, the money remaining in the bank. Learned counsel for cross-appellants have prepared, with great pains and accuracy, four statements showing exactly how the money of these cross-appellants was actually dealt with. These statements are a statement of the Mississippi administration; a statement of the North Carolina administration; a statement of the guardians' account, so called; and, fourth, a statement of the aggregate result, showing the balance of money on hand at the expiration of each month, being the aggregate of all three funds. It will thus be seen that the executors dealt with the money in a threefold way: First, money from the Mississippi administration; second, money from the North Carolina administration; and, third, money charged to themselves as testamentary guardians on the books of the bank. It clearly appears from the record that commencing with the month of January, 1890, at the expiration of which month there was on hand the sum of $11,737, there was a continuous and progressive increase of balance on hand until February, 1892, when that balance reached the large sum of over $44,000. The record further shows that, while in the month of February the distribution above referred to was made, still at the end of that month there was on hand in cash in the bank the sum of over $32,000; and from that day forward until the end of the month of May, 1898, there was always on hand an amount of cash ranging from about $26,000 to $36,000; and this, too, excluding all the stocks and bonds held by the executors or the heirs, and also excluding any sums of money loaned by the executors for the benefit of the heirs. In fact, the executors never loaned any money for the benefit of the heirs, except two loans of $5,000 at one time, and $2,000 at another, to the Ables, and one loan of $700 made by them as guardians to Norfleet Owens. Another thing of supreme significance in connection with this assignment of error is the fact that these very large sums of money were retained on hand

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from January, 1890, in an estate which was absolutely free from debt, not more than about $100 having ever been paid by these executors on any debts due by Silas Owens at the time of his death. Another striking fact is that whilst these large sums of money were thus lying in bank and being used by the bank in its banking business, no distribution whatever was made until February, 1892, which was two and one-half years after the administration began; while during all this time these executors, as officers of this bank and stockholders therein, were lending money at ten per cent per annum for the bank to these adult distributees, and at the same time, as executors, were selling property of the estate to some of the adult distributees, and, instead of having it paid for by their money in the bank on deposit, exacted from them notes at ten per cent interest per annum. The record shows further than there was on hand to the credit of the estate in the bank at the end of 1890 some $11,700, and that this sum was continually increasing and unemployed until the month of February, 1892, when it amounted to over $33,000, and at the same time there was in the bank, from the North Carolina administration, an additional amount of money, which in November, 1890, had reached the sum of more than $10,800, and in February, 1892, had increased to over $11,000; making the aggregate amount in the bank on these two funds, both of which belong to these heirs, and the difference between which was merely technical, a sum of money ranging from over $11,000 to over $44,000 in February, 1892. Yet the record shows that these executors sold the household furniture to Mrs. S. D. Bryant, one of the heirs, for the sum of $297, on the 16th of April, 1890, and charged her six per cent interest on the purchase money until the distribution was made in February, 1892, although at the time of the sale there was in the bank, belonging to the estate, one-seventh of which was Mrs. Bryant's money, over $16,000 in cash; and the record further shows that the executors were loaning an heir, for the bank, a sum of money aggregating nearly $5,000, at ten per

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cent interest per annum. Further, this record shows that in the same way, and during the same time, the executors sold, to Norfleet Owens, Silas Owens' one-half interest in the stock of merchandise belonging to Silas and A. T. Owens for $746, and charged him interest at ten per cent per annum, and were also loaning him various sums of money, on which he was charged ten per cent interest for the bank, all of which sums were held out of his distributive share in February, 1892, and the widow was dealt with in the same way. It was the bounden duty of these executors to make annual accounts, and exhibit to the court the condition of the estate in their hands; and yet until this proceeding was instituted, in 1900, more than ten years after they had qualified as executors, they had filed only one annual account, and that not until two years and four months after they had taken out letters. The estate owed no debts whatever, and in such case they should have made a distribution, under the statute, at a period not later than twelve months after they had qualified as executors—to wit, September, 1890. Yet they made no such distribution, but held in their hands in their bank a sum of money ranging from $18,000 to $44,000, without any reason whatever—"dead in their hands, without reason or necessity, when it ought to have been distributed," to use the expressive language of this court in *Anderson v. Gregg,* 44 Miss., 182. Some of these heirs were then of age, and by the express provisions of Silas Owens' will they were entitled to their money; but they not only did not get it upon arrival at age, as clearly shown by these accounts and vouchers, but, on the contrary, interest at ten per cent per annum was exacted from them on credit sales made to them of the estate property and on loans made to them by the bank. It certainly needs no citation of authorities to show, on these facts, that, on both the Mississippi administration and the North Carolina administration, the executors should have been charged with interest, compounded at six per cent per annum, on the average amounts on hand during the aggregate period from September,

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1890, one year after letters were taken out, to the date of final settlement. They should, however, be credited with a rate of interest allowed by the bank for two years at six per cent per annum, and afterwards at four per cent per annum.

It is very strongly urged, and a great many authorities are cited to support the proposition, that inasmuch as these executors styled themselves testamentary guardians, and charged themselves up as testamentary guardians on the books of the bank, they should be dealt with as guardians, and estopped to deny that they were, and charged with interest at ten per cent per annum, compounded. The will did not make them guardians; they were never appointed guardians by the chancery court; and Price gives as his explanation of why he signed himself "testamentary guardian" in a petition which he himself drew, and charged himself as testamentary guardian on the books of the bank, that he did so simply to keep the accounts of the minor heirs separate. We are not prepared to say, in view of the whole testimony touching this matter, and in view of the rule laid down in *Troup* v. *Rice,* 55 Miss., 278, as to the rate of interest to be charged in such cases, that any higher rate than the legal rate—six per cent per annum—should be charged against these executors.

As to the second assignment of error, it is enough to say that, on the whole, we do not think it is supported by the testimony.

As to the third assignment of error, we think the court should have charged these executors with interest on the small sum involved for the period they allowed it to remain in the hands of Latham, Alexander & Co., without excuse therefor. They left this money in the hands of these New York bankers for nearly fifteen years, and in fact never collected it until compelled to do so by this proceeding.

As stated, the matters of commissions and of attorney's fees were reserved by the chancellor, and are not before us for re-

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vision, and this obviously disposes of the fourth and fifth assignments of error.

The seventh assignment of error is clearly well taken in part. There is an observation to be made about this assignment —to wit, that it fails to note the fact that A. T. Owens did not pay back any part of the $1,610 allowed him for commissions to the surviving widow of Silas Owens. It is plainly shown by the vouchers that he paid the whole sum to his nieces and nephews. The widow was just as clearly entitled to her one-seventh part as the nieces and nephews to their respective parts. There were seven heirs, including the widow, and one-seventh of $1,610 would be $230; and if, therefore, A. T. Owens had returned his commissions to the estate, or distributed the same amongst all the heirs, as Price erroneously says he did, then each of the heirs would have been credited with $230; but the fact is that, under the bookkeeping, the widow was left out entirely, for one-sixth of $1,610 is $268.33 1-3, and this is the exact sum, to a cent, credited to each of the minor children. Whilst it is true that technically it may be said that Owens, since he left out the widow and receipted for the commissions, dealt with the commissions as his own, and made a donation of them, not to the estate in general, but to his six nieces and nephews, yet what he intended is clear, and substance must not be sacrificed to form. He declined to receive any commissions whatever. He actually had outside counsel to intervene and get Chancellor Trigg to reduce the commissions from five per cent, the rate first allowed, to four per cent, and then immediately directed Price to credit back his commissions to the estate. That was his purpose, clear and definite—to accept no commissions whatever, and to return those allowed to his brother's estate. Because subsequently he and Price, in making out their final account, in the mere matter of form, credited only the six minor children, instead of crediting the widow as well, to hold that the manifest intention of A. T. Owens, the real fact standing out clear, shall be sacrificed to a mere trick of bookkeeping,

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would be to substitute shadow for substance, a thing which a court of equity abhors. We therefore think that the action of the court below was substantially correct in this matter, but subject to this modification: That the final account should be so restated as to secure to the widow her share, and give the six children of Silas Owens only one-seventh part each, instead of one-sixth part of said commmissions. To this extent only the said seventh assignment of error should be sustained, A. T. Owens' estate being credited with the whole $1,610.

It follows from these views that the chancellor in the court below erred in the respects indicated, and that the decree on the cross-appeal is reversed in these particulars, and the cause remanded on cross-appeal, to be proceeded with in accordance with this opinion. The costs attending the appeal of Mrs. Laura L. Owens, executrix, will be taxed against her as executrix; the other costs will be taxed against the executors.

Decreed accordingly.

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Syllabus.

AMERICAN COTTON COMPANY v. LEANDER W. HERRING.

1. SALES. *Contract. Breach by buyer. Remedy of seller.*

On the breach of a contract to purchase personal property the seller may:

(*a*) Complete the contract on his part, and sue for the contract price; or

(*b*) Treat the contract as ended, retain the property as his own, and sue for the difference between the market value and the contract price; or

(*c*) Sell the property at public or private sale for the best price he can obtain, and sue for the difference between the price realized and the contract price.

2. SAME. *Case. Measure of damages.*

Where by the terms of a contract defendant agreed to buy plaintiff's cotton during a season at an agreed sum per hundred pounds less than the market price of cotton in a certain city on the day of sale and the plaintiff tendered a designated number of bales when the market price in said city was 9 13-16 cents per pound, which the defendant refused to buy at that price, but offered to do so on the basis of 9 9-16 cents per pound as the city market price, which plaintiff declined, subsequently selling at 9 cents per pound, the measure of plaintiff's damages is not the difference between 9 and 9 13-16 cents per pound, but the difference between 9 9-16 and 9 13-16 cents per pound.

3. SAME.

Where defendant agreed to purchase all complainant's cotton during a season at twelve cents per one hundred pounds below the actual *bona fide* market value of the cotton in a warehouse at another place, and the agreement stated that the price would "ordinarily" be based on the last official quotation of the day, though defendant was not bound to adopt the closing quotations for the day as a basis by which to estimate the price which it would pay for the cotton, it could not, at any time, under the contract, compel complainant to take less than twelve cents per hundred pounds below the actual value of the cotton, whatever basis was adopted in arriving at that value.

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Brief for appellant and cross-appellee.

4. SALES. *Waiver by seller.*

Where defendant had agreed to take all of complainant's cotton during the season at a stipulated amount less than the actual market value of the cotton on the day on which it was sold, and on a certain day refused to pay complainant the contract price in accordance with the market quotation on that day, but thereafter complainant did not notify defendant that he intended to stand on his contract, but continued to treat the cotton as his own, and acted in accordance with a letter in which defendant repudiated the terms of its original agreement, he thereby waived his rights under the contract.

5. SAME. *Right to storage, insurance, etc.*

Where complainant offered cotton for sale at a certain price, and defendant refused to take it, and complainant did not insist on the terms of a contract by which defendant was bound to take it at that price, but left the cotton in storage with defendant, treating it as his own, defendant was entitled to charge complainant storage, insurance, and interest on money advanced on the cotton left with him.

6. SAME.

Where complainant directed the sale of cotton at nine cents, he waived his rights under a contract by which he was entitled to the actual *bona fide* market value of the cotton on the day of sale, and which, on the day of his order, was nine and one-eighth cents.

FROM the chancery court of Grenada county.

HON. JULIAN C. WILSON, Chancellor.

Herring, the appellee, was complainant, and the American Cotton Company, appellant, defendant in the court below. From a decree partly in complainant's favor the defendant appealed to the supreme court, and complainant prosecuted a cross-appeal. The facts are stated in the opinion of the court.

W. A. Percy, for appellant and cross-appellee.

So far as the cross-appeal is concerned, the chancellor, of course, was correct, as will be seen from the record. Herring himself offered to sell the five hundred bales of cotton at 9 cents, and the company paid 9 cents for it. There

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was no duress or waiving of any rights, nor any complaint, and a settlement was had after the account sales were received, and after going over the accounts carefully the final balance as found due was paid, and that is an end of that.

It must be conceded that the theory upon which the original bill in this cause was filed—to wit, a sale and passage of title on December 5, 1900—cannot be sustained. Whether theAmerican Cotton Company broke its contract with Herring or not in not purchasing on that day at the closing quotations, the fact remains that the title remained in Herring and that his cotton remained liable for storage and insurance charges, and he was liable for interest on the money advanced him on the cotton; so that in any view of the case the chancellor was wrong in rendering judgment for these items against the American Cotton Company. But the complainant's whole case turns upon the liability which the defendant incurred in refusing to take up the cotton according to contract; and while he sues upon the theory of an actual sale, which is not sustained by the proof, no doubt under his prayer for general relief he would be entitled to recover any damages occasioned him by the breach of the contract upon the part of the American Cotton Company unless the breach had been waived. So that the sole question for the court to determine is as to whether or not the right of action lies in favor of Herring for the refusal of the cotton company to pay him 9 13-16 cents for his cotton and offering him 9 9-16 cents, and if so, what is the measure of damages?

When the telegram of December 5th was received the cotton had not been delivered, at least only fifty-eight bales had been delivered, to the American Cotton Company, and immediately the American Cotton Company wired back that the cotton could not be accepted at closing quotations, but could only be accepted at 9 9-16.

The court below very properly stated that the delivery by the executory vendor of the cotton to the carrier, under such

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circumstances, was no delivery to the vendee. Meacham on Sales, sec. 1092.

In view of the relationship between the parties, it is perfectly clear that after the receipt of the telegram from the American Cotton Company on December 5th, the 242 bales, when afterwards shipped, were therefore held by the American Cotton Company, as warehousemen, just as the 58 bales shipped in October were held; so that it was only a breach of an executory contract to sell, with the vendor retaining possession and control of the property. The extent of this breach was the difference between 9-16 and 13-16, the price to be paid. When the contract was thus broken, Herring had the right to treat the contract as at an end and bring his action for the breach of it, and in such action he would have been entitled to recover such damages as then arose from the non-performance of the contract, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss.

The measure of damages in such a case is the difference between the contract price and the market price at the time of the delivery. In the case under consideration the time of the breach and the time of the delivery were practically the same, and the measure of damages was the difference between the contract price and the true market price; but 9 13-16 was the market price, and, therefore, under the ordinary principles of law, it is a case of *damnum absque injuria.* But it is correctly maintained that there was no market price for this particular kind of cotton. In such a case the measure of damages is the difference between the contract price and the highest price obtainable, or, as it is stated in Meacham on Sales, par. 743, the actual value.

And this is the rule where the price is controlled by the trusts. *Id.,* par. 208. The highest price obtainable on the day of the breach was the offer of the American Cotton Company of 9 9-16, and it was the duty of the vendor to have sold

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Brief for appellee and cross-appellant.

the property at the highest price obtainable, and to have held the American Cotton Company for the difference.

But before any damages could accrue from the breach two things were incumbent upon the executory vendor: First, to use due diligence in selling the property at its market value; second, to notify the vendee that such sale would be made. It has been held that "where after a buyer in a contract for the sale of seeds had refused to accept them, and the seller received and refused a *bona fide* responsible offer for the seeds at a higher price than that finally obtained, the sale was not made with due diligence." *Gell* v. *Milwaukee Produce Co.*, 93 N. W. (Wis.), 26.

Nothing is better settled, even where there is a sale of the property, instead of an executory sale, than that notice of the seller's purpose to resell must in some way be given. Meacham on Sales, par. 1634, and cases cited.

In the case at bar, immediately upon the refusal to pay the market price as fixed by the closing quotations, a right of action accrued to Herring for damages arising from the breach, but he did not thus terminate the contract, which was an election to keep the contract open and pass over the breach. *Roth* v. *Tayson*, 8 Ash., 120 (73 Law T. [N. S.], 628); *Ridgely* v. *Mooney*, 16 Ind. App., 362; *Indiana Canning Co.* v. *Priest, Id.*, 445; *Browning* v. *Simon*, 17 Ind. App., 45; *Lawrence, Etc.*, v. *Mercantile Co.*, 58 Kan., 77; *Diamond State, Etc.*, v. *R. R.*, 11 Tex. Civ., 587.

William C. McLean, for appellee and cross-appellant.

The failure of the appellant to pay for the cotton at its then actual *bona fide* market value—to wit, 9 13-16 cents per pound—was a breach of the contract, and thereupon it became liable to appellee for the difference in value between what it subsequently paid for the cotton—to wit, 9 cents—and its then actual value—to wit, 9 13-16 cents per pound. It is unnecessary to multiply authorities or to argue this question, for the rule seems

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Brief for appellee and cross-appellant.

to be well settled by almost all of the authorities that "the vendor of personal property when the vendee has declined to take the property, and pay for it, ordinarily has the choice of any of three methods to indemnify himself against loss: First—He may store or retain the property for the vendee and sue him for the entire purchase price. Second—He may sell the property and recover the difference between the contract price and the price obtained upon a resale. Third—He may keep the property as his own and recover the difference between the market value at the time and place of delivery and the contract price." *Moore* v. *Potter,* 155 N. Y., 481 (s. c., 63 Am. St. Rep., 693, 694, and authorities cited and notes, pp. 697, 698, and authorities cited); *Grist* v. *Williams,* 111 N. C., 53 (s. c., 32 Am. St. Rep., 782, and notes).

This court held in *Planters Oil Mill Company* v. *Falls,* 29 So. Rep., 786, that as between seller and purchaser there is delivery when the goods are delivered to the carrier for transportation to the purchaser.

We contend that the sale of the cotton was completed and executed when the 242 bales were delivered to the Transportation Company at Vaiden, and the appellant was notified of this intention, and instructions were given by telegram that the cotton was that day sold, and we therefore contend that appellant was compelled to pay the actual *bona fide* market value, which was 9 13-16 cents per pound; in other words, the appellee fully complied with his part of the agreement, and the courts should make the appellant comply with its part of the agreement by making it pay the difference between what it actually paid and what it ought to have paid under the contract for the cotton. We call the court's special attention to the fact that the appellant was the only person to whom cotton put up into round bales could be sold; the appellant was the only person in the market for this class of cotton. The bill makes this allegation, and it is not denied in the answer; and in addition Herring testifies to this fact, and he is nowhere contradicted.

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This is a very different case from where there is an executory contract of sale and where before the time fixed for delivery and before the vendor has appropriated any of the property on the contract the vendee countermands the order and thereby repudiates the contract. In which case quite a number of authorities hold that action for special damages for refusal to receive the property when the delivery was tendered is the proper action, and that the vendor must notify the vendee that he would sell the property for his account and hold him responsible for the difference between the contract price and the market value. But in this case the proof is clear that there was no market value at all for cotton put up in round bales (this is alleged in the bill and is not denied in the answer and is proved), there was no person except the defendant who would buy this cotton; the complainant was completely at the mercy of the defendant. He had to sell to the defendant or not sell at all. The defendant was bound to know of the existence of the fact that it was the only person in the market for this class of cotton. The defendant never declined to receive the cotton, but as a matter of fact did receive the cotton and actually advanced to the complainant the value of the cotton less 10 per cent discount upon a basis of 9 9-16, but when it settled with complainant in February, 1901, only allowed him 9 cents for the cotton. To say that complainant cannot sue for the difference between the value as fixed under the contract and the amount allowed to complainant by defendant would be to permit this trust to impose upon and defraud its licensees.

HARRIS,* Special Judge, delivered the opinion of the court.

This case is here on appeal and cross-appeal from a decree of the chancery court of Grenada county. The facts are as follows:

The American Cotton Company is a foreign corporation, and

*Chief Justice Whitfield being disqualified in this cause, excused himself, and J. B. Harris, Esq., a member of the Supreme Court bar, was appointed and presided in this case in his place.

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the owner and patentee of a device whereby cotton is put up into what is known as the "round lap bales." On the 23d day of May, 1900, a contract was entered into between the American Cotton Company and L. W. Herring, of Vaiden, Miss., under which contract Herring agreed to install, and did install, the machinery of the company, as licensee, in connection with a gin plant, at Vaiden, Miss., to put up round lap bales. The contract, which is in evidence, is very voluminous, but only one provision is involved in this controversy, which is as follows: "The American Cotton Company hereby agrees that it will purchase from you during the cotton season ending March 1st, 1901, cotton properly put up in round lap bales on the presses of the American Cotton Company in accordance with your agreement dated May 23d, 1900, and to pay for same f. o. b. cars at Vaiden, Mississippi, at 12 cents per one hundred pounds below the actual *bona fide* market value in warehouse at Memphis, Tenn., for the same grade of cotton in uncompressed bales on the day of purchase. This price will ordinarily be based on the last official quotation of the day." Under this contract appellee, Herring, in the fall of 1900, began operations. On October 24, 1900, the American Cotton Company addressed a letter to Herring and its other licensees, in which it stated that it had found that the local quotations in Memphis and other points did not represent the actual *bona fide* market value of the cotton at the warehouses at such points for cotton in uncompressed bales, and that, "therefore, in accordance with the cotton agreement, we shall disregard such local quotations, naming instead thereof a basing limit that will represent the official *bona fide* market value in warehouses at such basing points for uncompressed bales. Actual market value ascertained through our close connections with other important cotton markets in the world shall be the basis of such limit. This limit will be figured on the most direct simple line of marketing. This makes no change either in the spirit or form of the cotton agreement. It simply supports a direct figure of actual *bona fide* market values

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in warehouses at basing points for cotton in uncompressed bales on the day of purchase, instead of quotations which had been so handled that they do not." The letter also states that daily limits would be sent to the licensee of the company, and they were not so sent. Herring did not reply to this letter, but proceeded to put up round lap bales, and shipped to the company's depository in St. Louis fifty-eight bales of cotton to be held in storage, in accordance with other terms of the agreement, not important here to be mentioned. In the 5th of December Herring then having fifty-eight bales of cotton n the American Cotton C.'s. depository in St. Louis, sent the following telegram to the American Cotton Co. at Memphis, Tenn.: "Sell three hundred bales, including holdings, at closin gquotations." On the morning of the 5th, however, the cotton company had telegraphed Herring as follows, "Memphis middling basis limit 9 9-16;" this telegram having been sent in accordance with the terms of the letter of October 24th, above mentioned. The closing quotation, however, was 9 13-16 per pound. As before stated, Herring had on deposit at St. Louis fifty-eight bales, and on December 5th he loaded on the cars at Vaiden two hundred and forty-two additional bales, and shipped them to the St. Louis depository, andd rew a draft on the American Cotton Company for the value of the cotton based o nthe price of 9 13-16. This draft was dishonored. On December 5th the American Cotton Company wrote Herring as follows: "We are in receipt of your telegram saying sell three hundred, including holdings, at closing quotations." We replied: "Cannot accept at quotations. Can only accept sales basis *bona fide* value as construed by letters sent you. We now await your reply." Herring did not reply to this letter. On December the 13th the company wrote to the bank at Vaiden, through whom Herring had made draft for three hundred bales on the basis of 9 13-16, which had been rejected, in which it reiterated its intention to disregard quotations, and in which it stated it would be glad to purchase Herring's cotton at the limits mentioned in their telegram. After

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this Herring wrote the following letter to Mr. Harvey, the manager of the cotton company at Memphis, dated December 21st: "The bank here is worrying me not a little about this cotton. If it suits you, you deduct 107 further and hold my cotton until further instructions. Let me know if this is satisfactory, and will forward matter. Yours truly, W. L. Herring. I will deduct ten and you deduct ten more." It is well to state that under the arrangement between the cotton company and the operators of its system, the licensee, upon shipping cotton to the company's depository, was given the privilege of drawing 80 per cent of the value of the cotton stored with the company. So Herring, on December 26th, after writing the letter above mentioned, drew a draft for the value of the two hundred and forty-two bales of cotton less 20 per cent, he having before that time drawn on the same basis against fifty-eight bales of cotton. On January 12, 1901, Herring sent the following telegram to the American Cotton Company: "Wire me Monday morning best offer on three hundred R.B.C. Memphis middling basis, and oblige." On January 14th the cotton company replied as follows: "In reply to your favor of the 12th we wired you best price on Memphis middling basis as requested." The three hundred bales of cotton referred to on December 5th were part of the three hundred and eighty bales referred to in the telegram of Herring on January 12th. On February 13, 1901, Herring sent the following telegram to the American Cotton Co.: "Five hundred bales and nine and one-fourth middling basis. Answer." The company replied on the same day as follows: "I am in receipt of your telegram reading as follows: "Five hundred bales at nine and one-fourth middling basis. Answer.' We replied: 'Telegram received. Cannot accept nine and one-fourth; our even limit nine and one-sixteenth.' " On February 6, 1901, Herring wired the cotton company as follows: "Sell five hundred bales cotton at 9 cents middling basis." This five hundred bales included all the cotton that Herring had on hand, including the three hundred bales referred to on De-

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cember 5, 1900. On February 23d the cotton company wrote Herring as follows: "Please advise if you desire held all of the four hundred and sixty-four bales of cotton which you have on hand applied on the five hundred bales sale made us on the 16th. Please let us hear from you at once, as we desire to send you account sales for the number you wish to apply on that contract." To this Herring replied on the 25th: "I have shipped out today thirty-six R.B.C., making five hundred in all shipped this season and including the balance of five hundred sold the American Cotton Company. Please forward account sales at once." The account sales were all forwarded to Herring on February 16th. It therefore appears that after the shipment of the two hundred and forty-two bales on the 5th, Herring shipped to the depository in St. Louis two hundred additional bales, making five hundred, which he ordered sold at 9 cents on February 16th. It is shown that on February 16th the closing quotations were 9 1-8. The company was offering 9 cents per pound, and Herring ordered the sale at 9 cents. The record shows that subsequent to the transaction of February 16th Herring made shipments, but they do not enter into this controversy. In rendering an account sales the cotton company charged Herring with interest on the money advanced on the fifty-eight bales of cotton from the date of the draft on the fifty-eight bales of cotton. It charged Herring with interest on the money advanced on two hundred and forty-two bales of cotton from the date of the draft for that cotton. It charged him storage, and aso insurance, for the time the cotton was on hand until February 16, 1901, when the company claimed the sale was made.

On September 13, 1902, Herring filed his bill in the chancery court of Grenada county (he having at that time ceased to do business with the cotton company) against the American Cotton Company and Bowen Bros. & Leverett, the latter being residents of the state of Mississippi. The bill alleges that the American Cotton Company was a foreign corporation, and

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had property in the hands of Bowen Bros. & Leverett in Grenada county, which consisted of the round lap outfit belonging to the American Cotton Company, the bill being a chancery attachment. The bill set up the contract above referred to, and alleged a breach of the same, claiming that a sale of the three hundred bales of cotton was made on December 5, 1900, at 9 13-16 per pound—the three hundred bales of cotton weighing 78,960—and claiming that the company was due him the difference between nine cents and 9 13-16 cents. He further claimed that the company had made an overcharge of interest on the fifty-eight bales of cotton as to all interest subsequent to the 5th day of December, 1900, and up to the 16th day of February, 1901; that it had made an overcharge of insurance for the same time and an overcharge of storage for the same time; that it was not entitled to any amount of storage or insurance on the two hundred and forty-two bales of cotton shipped on December 5th, or for interest on same advanced on that cotton; and, furthermore, that the company should have paid Herring for the two hundred bales shipped subsequent to December 5th, instead of 9 cents per pound, 9 1-8 cents—in other words, that on the two hundred bales of cotton, amounting to 53,775 pounds, the cotton company was due under the contract one-eighth cent per pound.

An answer was filed by the American Cotton Company denying that there was a sale of cotton on December 5th as claimed; denying that there was an overcharge in insurance, storage, or interest; alleging that there was no sale of cotton until February 16, 1901, at which time the cotton was sold for the complainant and on his order at 9 cents per pound.

It was shown that the American Cotton Company was the only buyer of round lap bales. There was no one else in the market for such cotton. It was also admitted that on December 5, 1900, the American Cotton Co. was in the market for cotton, and offering on that day to pay 9 9-16 cents per pound. It may also be taken as established by proof that the actual

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market value of cotton in uncompressed bales in Memphis on December 5, 1900, was 9 13-16; and it is also shown that on February 16th closing quotations were 9 1-8.

The chancellor decreed that the complainant was entitled to recover of the cotton company the difference between 9 cents per pound, the price at which the cotton was actually sold on February 16th, and 9 13-16, the closing quotation on October 5, 1900—in other words, that he was entitled to recover thirteen-sixteenths of a cent on 78,960 pounds, being the three hundred bales of cotton claimed to have been sold on December 5th. He also decreed that the cotton company had made an overcharge of interest, insurance, and storage on fifty-eight bales of cotton alleged to have been sold on December 5, 1900, and that the cotton company was not entitled to charge any interest, storage, or insurance on the two hundred and forty-two bales of cotton shipped on December 5, 1900. He further decreed that the complainant was not entitled to recover the difference between 9 cents and 9 1-8 cents on the two hundred bales of cotton sold on February 16, 1901. He further held that the complainant was not entitled to an allowance of $86.54, being 11 points allowed complainant on the sale of three hundred bales of cotton. He also disallowed the claim of complainant for $49, an alleged overcharge in insurance. It should be explained here that the item of $86.54, being an allowance of 11 points disallowed complainant in the chancery court, was claimed to be an allowance made by the American Cotton Company of 11 points for the purpose of equalization of prices as between the non-compressed and round lap bale. At all events, on the account of sales rendered the complainant on February 16, 1901, this allowance was made on the whole five hundred bales of cotton. From this decree the American Cotton Company appealed, and the complainant took a cross-appeal as to the items disallowed by the chancellor.

We are of the opinion that the decree must be reversed. In no view of the case, under the facts disclosed in this record, was

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the complainant entitled to recover the difference between 9 cents and 9 13-16 cents on the three hundred bales of cotton claimed to have been sold on December 5, 1900. He could only recover the difference between 9 9-16 and 9 13-16 in any view. He could have taken the 9 9-16 and sued for the difference, or completed the contract on his part, and received the contract price, the actual value of the compressed cotton. Should we find that there had been a breach of the contract between the cotton company and the complainant, the rule seems to be settled that there were three methods of arriving at a proper measure for damages on a breach of contract of this kind: (1) The seller may complete the contract on his part, and recover the contract price. (2) He may treat the contract as ended, retain the property as his own, and sue for the difference between the market value of the cotton and the contract price. (3) He may sell the property at public or private sale for the best price he can obtain, and sue for the difference between the price realized and the contract price. The rule is set forth in Benjamin on Sales (6th ed.), pp. 744, 776; also in Tiedman on Sales, sec. 333 *et seq.; Dobbins* v. *Edmonds,* 18 Mo. App., 307 (63 Am. St. Rep., 692, 697). The complainant adopted none of the three methods which we have pointed out. While it is true that the American Cotton Company was the only purchaser of round lap cotton, at the same time it was shown beyond controversy that it was in the market for cotton, and was ready to pay instantly on December 5th 9 9-16 cents per pound for the complainant's cotton; was offering that price to the complainant. The complainant was fully protected by his contract, and he could have demanded and recovered from the complainant the actual *bona fide* market value of the cotton on each and every day that he had cotton to sell. The complainant, however, did not stand upon his contract. He did not notify the cotton company that he would stand on his contract, and demand the thirteen-sixteenths and disregard their letter of October 24th, in which he was notified that the company would no longer be governed by

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quotations, but would fix the actual market value on a different basis. On the contrary, the complainant treated the cotton as being stored for his account, and drew draft for 80 per cent of its value, as fixed by the cotton company's limits as outlined in their letter of October 24, 1900. It will be borne in mind that the contract made with the complainant provided that ordinarily the closing quotations would be taken as basis in ascertaining the actual *bona fide* value of cotton; but the contract did not say that closing quotations would be absolutely taken, and this left the cotton company in a position to change the basis; but, whether or not it changed this basis of estimating the actual value, it could not, under the contract, at any time compel the complainant to take less than the actual value, whatever basis it might adopt at arriving at that value. During the life of the contract the complainant could compel the cotton company to take his cotton at 12 cents per 100 pounds less than the actual value of uncompressed cotton in the warehouse at Memphis. If, on December 5th, the actual value of uncompressed cotton in the warehouse at Memphis was 9 13-16 cents per pound, the complainant could have compelled the cotton company to pay him that for his cotton, regardless of its efforts to change the basis of estimating the value or of "limits" fixed by it. The complainant, however, did not elect to stand upon his contract. He recognized the limits fixed by the cotton company, drew on it for 80 per cent value of three hundred bales of cotton, left some in the warehouse in St. Louis on deposit, and continued to refer to it in his letters and telegrams and deal with it as his (complainant's) cotton, and on February 16, 1901, directed the company to sell the cotton at 9 cents middling basis, which was done, and an account sales rendered as of that date. We are clear, therefore, that the complainant is not entitled to recover the difference between 9 cents and 9 13-16 cents under any view. But we are further of the opinion that the complainant is not entitled to recover anything on account of the three hundred bales of cotton. He clearly waived his rights under the

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contract. He treated the cotton as his own. Not only did he never notify the company that he intended to stand on his contract; but, on the contrary, he dealt with it, with his letter of October the 24th before him, without decling to accept the terms of the letter, but on the contrary, acting in accordance with it.

We are not holding that the company had the right to break its contract with complainant, or to materially modify it, without his consent; but it had notified complainant of the intended modification of the contract, and the complainant made no protest, but continued to deal with the company on the line of their notification to him of the modification, and he is bound by his acts. There was no way for the company to get away from its contract with the complainant without being liable to it according to its terms, unless he consented or waived his rights under the contract; and we think in this case that he clearly waived his rights under the contract. Therefore we hold that the cotton company was entitled to charge the complainant storage, insurance, and interest, as was shown by the record, on the three hundred bales of cotton, made up of fifty-eight bales in storage December 5, 1900, and two hundred and forty-two bales shipped on that day.

In regard to the claim of one-eighth of a cent per pound on two hundred bales of cotton sold on February 16, 1901, we think the decree of the chancellor was correct. The complainant directed the cotton sold at 9 cents. He again waived his rights under the contract, and accepted 9 cents per pound for the cotton, when he could have stood upon his contract; and if 9 1-8 was the actual *bona fide* market value of uncompressed cotton in warehouse at Memphis on February 16th, by the terms of the contract he could have received that sum; but he did not stand on the contract.

It is useless to talk about the American Cotton Company being the only buyer of such cotton as the complainant was offering, or that the complainant was at its mercy and had to accept what it offered. He did not have to accept this unless he waived

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Statement of the case.

his rights under the contract. He was protected by the contract, and there is no pretense that the cotton company was not amply able for damages for its breach.

In regard to the item of $86.54, being the 11 points allowed on three hundred bales of cotton, we are unable to see by what theory the chancellor arrived at the conclusion that the complainant was not entitled to this allowance. The cotton company was not demanding it. The point does not seem to have been raised at all. It was allowed to complainant on settlement for the cotton, and he was entitled to it. We do not find in the record that the cotton company was demanding this payment, nor is it claiming it here, and therefore the decree upon this point is erroneous.

Our conclusion is that the decree of the chancellor on the direct appeal should be reversed. On the cross-appeal the decree should be reversed as to the item of $86.54, but affirmed in all other respects, and decree here dismissing the bill.

Reversed and decreed here.

WILLIAM A. TISDALE v. THREE INSURANCE COMPANIES.

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EQUITY. *Jurisdiction. Multiplicity of suits. Inadequacy of legal remedy.* Where property destroyed by fire was insured in three insurance companies, the policies containing substantially the same provisions, and the owner brought three separate suits at law, one against each company, demanding the face of each policy, and the companies filed the same pleas setting up the same defenses, a bill in equity will lie by the companies to restrain the suits at law requiring the suits to be tried in equity, on the grounds of preventing a multiplicity of suits and the inadequacy of the remedy at law.

FROM the chancery court of Covington county.

HON. STONE DEAVOURS, Chancellor.

The Insurance Company of North America, the Aetna Insurance Company of Hartford, Connecticut, and the Philadel-

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Statement of the case.

phia Underwriters Insurance Company of Philadelphia, appellees, were complainants, and Tisdale, appellant, was defendant in the court below. From a decree favorable to complainants, the insurance companies, the defendant appealed to the supreme court.

Tisdale was the owner of a storehouse in the town of Collins, in which he carried on a drug business. He was insured in three different companies against loss by fire, as set out in the opinion of the court. In January, 1903, the building was destroyed by fire, and there was a partial loss of the stock of merchandise. He filed three separate suits—one against each company—in the circuit court of Covington county, demanding the face of each policy. The several defendants appeared, and filed pleas setting up exactly the same defenses. They afterwards filed the bill in this case in the chancery court of Covington county, setting out these facts, and charging that all three of the complainants had issued policies covering the same property of the defendant, and that the several policies were concurrent insurance on the same property; that they were being sued in three separate suits at law; that the defenses of each defendant to the several suits were identical, and that each of said suits was about the same subject-matter, and involved common principles of law, and the same facts, and the liability to defendants of each is not independent, but is a concurrent liability; that in separate suits at law it is impossible to determine the equitable rights of complainants and the defendant under said policies, by reason of the inadequacy and insufficiency of the remedy at law in separate suits to marshal and ascertain the real liability of complainants, and because said suits involved identical questions of defense, and a multiplicity of suits of common questions of law and fact, and over property in which complainants and defendant have common and mutual interests, and the court of law cannot do justice between the parties in said suits; that the stock of merchandise, after the issuance of the several policies, changed in specifics and quanti-

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Brief for appellees.

ty, in the usual course of trade, and at the time of the fire there was not an actual loss to the amount claimed by the defendant in the said suits; that the inventory, books, and proof of loss presented by defendant are untrue, incorrect, false, and fraudulent, and in no sense comply with the requirements of the policies and the law. Complainants offer in their bill to pay whatever amount may be ascertained to be due by each of them. The defendant demurred to the bill, and moved to dissolve the injunction restraining said suits at law. The demurrer was overruled, and the motion to dissolve the injunction was also overruled. From that decree defendant appeals.

Alexander & Alexander, for appellant.

[The brief of counsel for the appellant was lost or withdrawn from the record before it reached the reporter.]

Williamson & Wells, for appellees.

This bill should be sustained on the sole ground that it presents a multiplicity of suits

Tisdale owned a stock of merchandise and desired to insure it against loss by fire. The stock of goods was worth, when insured, $2,500. It constantly changed, specifics and quantities. One of the complainant companies entered into contract to insure against loss to the extent of $1,000, the other two assumed liability for $750 each, in case of fire it being agreed between the assured and each of the companies that concurrent insurance might be taken on the stock of goods not to exceed $2,500 in all; it being stipulated in each contract that in case of fire the company should be liable for its proportional share of the loss or damage sustained, not to exceed the amount of the face of the policy issued by it. These three companies joined in indemnifying Tisdale against loss by fire to the amount of $2,500, which sum was fixed by all parties as the value of the stock of merchandise at the time the insurance was issued, and this was the maximum amount of insurance assured could carry on

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Brief for appellees.

it, and the several contracts stipulated what portion of the value of the stock so fixed, each company would insure, and what portion of loss each assumed to pay in case of fire.

Now a fire occurred, and there was a partial loss on the stock of goods. The bill avers and charges that the damage to and loss on the merchandise was insignificant and trifling, and did not approximate the full amount of all the policies, nor the face of any one of them. The demurrer admits this to be true. Under these contracts each company is liable to Tisdale, if any liability there be, only for its proportionate share of the actual loss sustained.

Now in the case of *Crawford* v. *Mobile, etc., R. R. Co.,* 83 Miss., 708, this court approves the doctrine laid down by Pomeroy in his work on equity, and in the cases of *Pollock* v. *Okolona Savings Inst.,* 61 Miss., 293, and *Railroad Co.* v. *Garrison,* 81 Miss., 257, on the subject of equitable jurisdiction to prevent multiplicity of suits. If the facts in the Cranford case above mentioned justified the intervention of equity, "on the sole ground that it would prevent a multiplicity of suits," the reasons for the assumption of like jurisdiction in this case are equally strong, if not stronger.

Further, when the several policies were issued by the companies on the same property and delivered to Tisdale, they, with him, became mutually interested in the property, and after the fire there was a community of interest among all the parties in the amount of the loss; so that there is in this case that common interest of all the parties in the subject-matter of the suit which would bring it strictly within the rule laid down by Judge Campbell in the case of *Tribbette* v. *R. R. Co.,* 70 Miss., 182.

We refer the court to the case of *Virginia Chemical Co.* v. *Ins. Co.,* 113 Fed. Rep., 1, and 109 Fed. Rep., 681. That case is on all fours with the one at bar, where the court of equity takes jurisdiction and settles four or five cases in one where the

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policies were concurrent insurance on the same property, the loss being partial.

All the companies being liable only for the actual loss caused by the fire, they have a right, upon the proofs in the case, to have it ascertained and to pay it in proportion to each one's liability under the contracts and the law. In a law court, in three separate trials, this cannot be done. No two juries will agree as to the actual loss on the stock of goods, though each jury will be acting upon the very same state of facts and proof and be governed by the very same principles of law. For instance, one jury in the case against the Underwriters of Philadelphia, which insured it for $1,000, may find the loss to be $100, and that would be the extent of its contribution to the loss, while in one of the other cases the jury may find the loss $1,000, and that company will have to pay the face of its policy, $750; in third case, the jury may find $250 loss, being $500 less than the face of that poicy. Such a result would be a great injustice to the companies and to the assured. Besides, it would not be law nor equity. A law court furnishes no adequate remedy for a case like this, but equity does.

WHITFIELD, C. J., delivered the opinion of the court.

The appellant was insured in three companies against loss by fire. One company insured him to the amount of $1,000 on his merchandise, and to the amount of $300 on the furniture and fixtures in the store. Each of the other two companies insured the building for $1,250, and the stock for $750. All of the policies were of the standard form, and contained the same provisions and stipulations. The fire occurred on the 13th of January, 1903, and destroyed the building, the furniture, and fixtures wholly, but only partially destroyed the stock of merchandise. Appellant brought three separate suits—one against each company—in the circuit court of Covington county, demanding the face of each policy. The defendants filed pleas, and set up exactly the same defense. The property insured was

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the same, and the principles of law governing the three cases were the same, and the facts were substantially identical. The bill further allleges incorrect and false bookkeeping in this: That he did not keep such an inventory and such a set of books as the policies required, and that they did not show the truth about the purchases and shipments in the business, and were not a complete record of the business transacted by the appellant. The bill was demurred to, and the demurrer overruled; hence this appeal.

We think the equity jurisdiction is maintainable on the ground of the prevention of a multiplicity of suits, as well as upon the inadequacy of the remedy at law. The very same principles of law and the very same facts determined each case. Besides, it is important to note that there could be but one true fixation of the actual amount of the loss, and yet each jury might put it at a different sum. We do not care to repeat the reasons set out heretofore. See the following authorities: *Crawford* v. *M. J. K. R. R. Co.*, 83 Miss., 708 (s. c., 36 South., 82, recently decided); *Virginia Chemical Co.* v. *Ins. Co.*, 113 Fed., 1 (51 C. C. A., 21).

Affirmed and remanded for answer in sixty days from filing of the mandate in the court below.

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Syllabus.

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CHARLES A. GORDON, ADMINISTRATOR, v. JOHN McDOUGALL ET AL.

1. WILLS. *Construction. Express trust. Payment of debts.*

A will creates an express trust for the payment of the testator's debts, which by its various items provides (1) for the payment of the debts as soon as it can be done without injury to the estate; (2) for the payment of one hundred dollars and an annuity to a servant; (3) that the testator's widow shall have all of his personal property during her life, with power to sell and dispose of it as she might see fit, but in such event the proceeds to be placed in the corpus of the estate, subject to the provisions of the will; (4) for the sale of encumbered real estate in another state "as soon as can be done without too great loss," with discretion to lease or sell at public or private sale and authorizing the extension of the payments due on the property or the renewal or execution of other judicious loans and mortgages to pay the encumbrance; (5) full power for the executors to carry on and cultivate the testator's plantations or to lease or sell any and all real or personal property of the testator in this state, which may be deemed expedient to pay debts, but directing certain pieces of land to be reserved until the last; (6) that the widow shall claim no allowance and charge no commissions for services rendered the estate, but shall be allowed a reasonable amount for the support of herself, family, and household, to be charged against testator's estate and be decided by her own judgment; (7) that the executors shall, "subject to the foregoing articles," have the entire control of the estate, and the widow the entire use of the income, rents, and profits thereof for her life, with power to dispose of one-fourth of the estate remaining at her death by will, in default of which the one-fourth was to remain a part of the estate; and (8) for the disposal of the remainder of the estate, subject to the life estate of the widow.

2. SAME. *Code* 1892, § 1838. *Statute of limitations on probating claims. Code* 1892, § 1933.

The statute of limitations, Code 1892, § 1933, providing that claims against the estate of a decedent shall be barred unless probated within one year after the publication of notice to creditors to probate their claims, has no application where the will of the de-

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Brief for appellant.

cedent creates an express trust for the payment of debts, under Code 1892, § 1838, providing that executors, whenever empowered by the will to pay debts, shall follow the directions of the will, as well as the general principles applicable to express trusts.

3. WILLS. *Accounting. Unprobated claims.*

Executors who have paid unprobated claims against the testator's estate, in conformity with the directions of a will, creating an express trust for their payment, should be credited therewith in their accounts.

FROM the chancery court of Claiborne county.

HON. WILLIAM C. MARTIN, Chancellor.

Exceptions by McDougall and others, appellees, to the accounts of Gordon, appellant, as administrator of the estate of J. H. Gordon, deceased, executor of the estate of L. N. Baldwin, deceased. From a decree for exceptors the administrator appealed to the supreme court.

H. C. Mounger, for appellant.

The will of L. N. Baldwin creates an express trust for the payment of debts. 8 Am. & Eng. Ency. Law (2d ed.), p. 1083; *Abbay* v. *Hill,* 64 Miss., 340 (1 South., 484); Beach, Wills, secs. 245, 247; *Morse* v. *Hackensack Sav. Bank* (N. J. Err. & App.), 20 Atl., 961 (12 L. R. A., 62); Hill, Trustees, 516, 541; *Steele* v. *Steele's Adm'r,* 64 Ala., 438 (38 Am. St. Rep., 15); *Templeton* v. *Tompkins,* 45 Miss., 424; Lawson, R. R. & P., sec. 1979; Pom. Eq., sec. 1009; *Norman* v. *Burnett,* 25 Miss., 183; Story, Eq., sec. 1058; *Morrison* v. *Kinstra,* 55 Miss., 71; Tiedman, Eq., sec. 290; *Cooper* v. *Cooper,* 61 Miss., 676; *King v. Bishop,* 62 Miss., 553; *Heatherington* v. *Lewenberg,* 61 Miss., 372; *Westbrook* v. *Munger,* 62 Miss., 316; *Turner* v. *Turner,* 57 Miss., 775; *Cady* v. *Cady,* 67 Miss., 425 (7 South., 216); *Clark* v. *Hornthal,* 47 Miss., 434; *Perkins* v. *First National Bank of Yazoo City* (Miss.), 33 South., 18; *Peebles* v. *Acker,* 70 Miss., 359 (12 South., 248); *Stewart et al.* v. *Robin-*

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son (Miss.), 31 South., 903; *Henry et al.* v. *Henderson* (Miss.), 33 South., 961 (63 L. R. A., 616).

Pintard & Ratcliff, on same side.

Counsel cited the following cases: 8 Am. & Eng. Ency. Law (2d ed.), p. 1083; *Abbay* v. *Hill*, 64 Miss., 340 (1 South., 484); *Smyth* v. *Caswell*, 65 Tex., 379; *Pleasants* v. *Davidson*, 34 Tex., 460.

J. McC. Martin, and *E. S., J. T.*, and *H. W. M. Drake*, for appellees.

The will of L. N. Baldwin does not create an express trust for the payment of debts. *Abbay* v. *Hill*, 64 Miss., 340 (1 South., 484); *Norman* v. *Burnett*, 3 Cushm., 188; *Combs* v. *Brown*, 29 N. J. Law, 36; *Ferry* v. *Laible*, 31 N. J. Eq., 566; Dickerson's Appeal (Pa.), 8 Atl., 64 (2 Am. St. Rep., 550); Bispham's Eq., 117 *et seq.*; *Steele* v. *Steele*, 38 Am. St. Rep., 20; Perry, Trusts, sec. 559; *Collamore* v. *Wilder*, 19 Kan., 67; *Carrington* v. *Manning's Heirs*, 13 Ala., 611; *Agnew* v. *Fetterman*, 45 Am. Dec., 671; *Gwin* v. *Nettles* (Miss.), 18 South., 798.

Gordon, the executor, should not have paid unprobated claims. Section 1933, Code 1892; *Ales* v. *Plant*, 61 Miss., 259; *Nagle* v. *Ball*, 71 Miss., 331 (13 South., 929; *Robinett* v. *Starling*, 72 Miss., 653 (18 South., 421).

WHITFIELD, C. J., delivered the opinion of the court.

In July, 1893, L. N. Baldwin died, leaving a last will and testament, dated July 8, 1890, naming his friend, J. H. Gordon, and his wife, Mary J. Baldwin, executor and executrix of his estate. That will is as follows:

"In the name of God—Amen: I, Lemuel N. Baldwin, of the town of Port Gibson, and state of Mississippi, of sound mind and disposing memory, do make, ordain, and publish this as my last will and, hereby annulling and revoking all wills heretofore made by me.

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Opinion of the court.

"Item 1st. I do hereby direct that all of my just debts be paid as soon as can be done without injury to my estate, and that my mortal remains be interred in a suitable square in the Port Gibson cemetery, and a proper monument to my memory be thereon erected.

"2nd. In addition to my previous gift of one hundred dollars to my old and faithful servant, Sukey Russell, I give her one hundred dollars to be expended in repairs on her house in Port Gibson, and the sum of ten dollars per month, payable on the first of each and every month, for and during her natural life.

"3rd. In case George Russell, Jr., shall, at the date of my death, be indebted to J. H. Danjean for and on account of his contract of $225.00 for building him a house on the lot conveyed to him by his mother and myself and wife in Port Gibson, I appropriate out of my estate a sum not exceeding two hundred dollars to pay said debt if so much is unpaid, but no more than the balance due said Danjean.

"4th. My gold watch and chain and buttons I give to my nephew, John Field McDougall, and my gold-headed cane I give to my nephew, Aaron D. Baldwin.

"5th. I give and bequeath to my beloved wife, Mary Jane Baldwin, all my personal property, including paintings in my residence and upon my premises, and carriage house property, for and during her natural life, with power to sell and dispose of the same as she may see fit; but in such event the proceeds are to be placed in the corpus of my estate subject to the provisions hereinafter specified.

"6th. I hereby expressly direct my executors hereinafter appointed, to sell as soon as can be done without too great loss, my two marble-front houses and premises in the city of Chicago and state of Illinois, originally numbered Nos. 121 and 123 on Calumet avenue, and for that purpose my executors are hereby authorized to lease or sell, in their discretion, at public or private sale, said premises separately or otherwise, and execute titles thereto to the purchasers as fully as I could do if alive. And

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in case of sale the incumbrances, now about $21,000.00, must be paid and the balance accounted for in my estate in Mississippi. And in case of a nonsale my executors are hereby authorized to extend the payments, renew the same, or execute other judicious loans and mortgages, to pay said $21,000.00 on said premises as fully as I could do now.

"7th. I do hereby give to my executors, hereinafter named, full power to carry on and cultivate my plantations or to lease the same, in their discretion, and to sell here or to ship any and all crops to New Orleans for sale, as I have heretofore done. And they are fully authorized to sell at private or public sale or sales, in their discretion, any and all personal and real estate of mine in this state which may be deemed necessary or expedient to pay my debts, and execute the proper titles to the purchasers.

"But I do hereby request that in such case my five places on the Bayou Pierre, in this county, and my place on Tchula Lake, in Holmes county, be held to the last, and other lands first sold, and all reported to the chancery court.

"8th. I desire that my said wife claim no 'allowance' and charge no commissions for services against my estate, but that she be allowed a reasonable amount for the support of herself, family, and household, to be charged in her account against my estate, to be decided by her own judgment.

"9th. Subject to the foregoing articles, I give to my said executors the entire control of my estate, and to my said wife, Mary Jane Baldwin, the entire use and incomes, rents and profits thereof, for and during her natural life, with power to dispose of one-fourth of my estate remaining at the time of her death, by last will and testament, in default of which the said one-fourth shall remain as a part of my estate and lapse.

"10th. Subject to the life estate of my said wife, and on her death I give, devise, and bequeath to my nephew, Aaron D. Baldwin, my niece, Fannie Baldwin Haines, my grand-niece, Fannie Baldwin Durland, the one-half of my estate in equal

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portions; and to my nephew, John Field McDougall, one-fourth of my said estate, to be held in trust by John H. Gordon until he shall attain the age of twenty-one years, said Gordon to pay him only the income. And I do hereby make and declare the said A. D. Baldwin, Fannie B. Haines, Fannie B. Durland, Bessie E. Haines, and John Field McDougall to be my legatees and devisees.

"11th. I have purposely left my wife independent of her and my relations, knowing that she will do right and will aid them as her judgment decides and their consideration for her may justify. I want no interference in behalf of her or my own relatives. My bequests and devises to her are in full of all claims on my estate.

"12th. I do hereby constitute and appoint my wife, Mary Jane Baldwin, and my friend, John H. Gordon, to be executors of this my last will and testament, and I do expressly relieve them from giving security for acting as executors.

"13th. In case of the death or nonqualification of John H. Gordon as executor of this will, I do hereby nominate and appoint my friend, John A. Shreve, as executor, with same duties and powers and conditions conferred on said Gordon, and in that event I request him to qualify at once as executor in the chancery court.

"Thus done and this page and the three preceding pages written wholly by me and in my own handwriting, this the 8th day of July, A.D. 1890. L. N. BALDWIN.

"Witnesses: James W. Person, Charles D. Wharton, Thos. M. Rea.

"Filed August 16th, 1893. A. K. JONES, *Clerk.*

"Recorded in Will Book No. 3, pp. 142-144."

Six accounts were filed, the executors having in the meanwhile taken charge of the decedent's property, cultivated the farms, managed it all as directed in the will, collected debts owing to the estate, and having paid debts due from the testator; selling for this purpose both real and personal property, some-

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times with, sometimes without, an order of the court. They paid unprobated claims, a report of which was made in all their accounts. On March 17, 1900, Mrs. Mary J. Baldwin having died in the meanwhile, exceptions were filed to these accounts, seeking to charge the surviving executor, J. H. Gordon, with the amounts which he and the executrix, Mrs. Baldwin, had paid out on unprobated claims, notice to creditors to prove their claims within the year having been duly made. The solution of the question here involved depends upon whether the foregoing will created an express trust for the payment of debts of the testator. Let us see what the environment was. Let us put ourselves in the place of Mr. Baldwin at the time he made his will, as an aid in arriving at his intent with respect to charging his estate with his debts. For the only way fairly to ascertain the true intent of a testator is not to look to any single sentence or special provision, but to gather that intent from the whole will, so that the paramount purpose dominating the instrument shall be given effect. Says the court in the case of *Watkins' Ex'rs* v. *Snadon* (Ky.), 20 S. W., 701 (40 Am. St. Rep., 205): "The language employed in a single sentence is not to control, as against an evident purpose shown by the whole instrument. Effect is to be given to the general intent, and this, we think, is shown throughout the will." Again, in the case of *Murphy* v. *Carlin* (Mo.), 20 S. W., 786 (35 Am. St. Rep., 701, 702), the court say: "The true intent and meaning of the testator can be best ascertained by the courts and those concerned in the execution of the will by putting themselves, so far as may be, in the place of the testator, and reading all his directions therein contained in the light of his environment at the time it was made. When that intent and meaning can be thus clearly ascertained, then all technical rules and adjudicated cases in other jurisdictions that would stand in the way of its execution must be disregarded." See also *Morse* v. *Hackensack Savings Bank* (N. J. Err. & App.), 20 Atl., 961 (12 L. R. A., 62).

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Opinion of the court.

Mr. Baldwin had been a member of the Claiborne county bar for a number of years, and was engaged in planting. His property consisted mainly of five places in that county, on the Bayou Pierre; one in Holmes county, on Honey Island; and a double marble-front dwelling in the city of Chicago, incumbered for about $21,000. At the time of his death he owed about $50,000. He seems to have been a man who took great pride in paying his debts and in keeping his credit good. At that time cotton was at a very low price, and remained so during the years while these executors managed this estate. By very careful management a large part of the debts has been paid off, and $40,000 saved for these exceptors. Undoubtedly if suit had been brought by the creditors, the estate would have been wholly absorbed. Mr. Baldwin knew this. He further knew that he could not live to pay off his indebtedness. His wife, at the time of the making of the will, was a very old lady. Some of these debts were debts in respect to which he stood in trust relations. He knew that it would take a number of years to pay his debts, if anything was to be saved from his estate. He had no child. It turned out that the Chicago property, when sold, just about paid the debt on it. This being the environment, let us look at the provisions of the will bearing specially on the question involved. In the first item of the will he directs that all his just debts, as soon as can be done "without injury to his estate," be paid. If the executors had to take the law, and not the will, as their chart, then the debts were exigible without reference to the injury to his estate. This reservation, therefore, has at least this significance: that his executors were not to sell the property as soon as they might be compelled to sell it under the law, if that would result in injury to his estate. In the second item of his will he gives Sukey Russell $100 *in solido,* and an annuity of $10 per month, payable on the 1st day of each month, during her natural life. This evinces his purpose that the estate on which this annuity was a charge, to last as long as Sukey Russell lived, was, if possible, to be saved from sale.

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Opinion of the court.

Here is a charge fixed upon the estate for an indefinite time. The fifth provision of the will gives to his wife, not the fee simple in the personal property named therein, but simply a qualified use of the same for her life; expressly stipulating that, in case she should sell such property, the proceeds should be covered into the corpus of his estate, subject to the provisions following in the will as to debts, etc. In the sixth provision of his will he again, in directing the sale of the Chicago property, manifests his concern that the property shall not be sacrificed, by directing that sale should be made by his executors as soon as could be done without too great loss, and by further directing that, if they thought best, instead of selling, they might lease the same, with authority to extend the time of payment on the notes, and to renew the notes, and to make other loans on the faith of the property. All this shows the utmost care that, whilst the property should respond to the debts, every available means should be used to prevent its sacrifice, to the end that there might be a balance, which balance he directs to be covered into his estate in Mississippi for the uses of the will. The seventh provision of the will gives to the executors full power (1) to carry on and cultivate his plantations; or (2) to lease the same, in their discretion; or (3) to sell at private or public sale, in their discretion, any of the personal or real estate of the testator in this state which may be deemed necessary or expedient by the executors to pay his debts, and to execute the proper titles to the purchasers. It further authorizes the executors, in carrying on and cultivating his plantations, to sell at home or ship any and all crops to New Orleans for sale, just as he had always done. Here is a clear contemplation of the carrying on and cultivating of his plantations in the same manner in which he had done when alive, and this is supplemented by full power to sell, as they deemed necessary or expedient, any of his estate, real or personal, and that, too, at public or private sale, for the purpose of paying his debts. Here the testator has blended in one common mass his real and personal estate, oblit-

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erating all differences which the law makes between the two as to the order of liability in the payment of debts. Empowering the executors to execute proper titles to purchasers is in all respects substantially equivalent to devising the property to the executors for sale for payment of debts. *Clark* v. *Hornthal,* 47 Miss., 434. And to make it perfectly clear that his purpose was not to sell if it could be avoided by a gradual payment of debts out of the proceeds of the crops in the course of the years, he adds, in the conclusion of this clause, a request that, in case of sale, his five places on Bayou Pierre and his place in Holmes county be held until the last, and other lands be sold first. This clause, taken in connection with what has gone before, presents necessarily this plain scheme: That his property should be dealt with by his executors, not as the law would have dealt with it, by immediate sale, without reference to the injury to his estate, but so as to pay off, if possible, the debts from the income, and not to sell till the last resort, and then to sell in the priority specified by this seventh clause. The eighth provision of his will is remarkable in requesting his wife to claim no allowance and to charge no commissions, but to be satisfied with a reasonable amount "for the support of herself, family, and household," to be fixed by her own judgment; and this becomes significant when, taken in connection with the ninth clause of the will, which expressly declares that he gives to his said executors the entire control of the estate, and to his said wife the entire use, rents, and profits thereof for and during her natural life, with power to dispose of one-fourth of the remaining estate at the time of her death, but all this subject to the foregoing eight articles of his will. We take the true construction of these clauses to be that Mrs. Baldwin did not take a life estate in the real estate, out and out, but that she took only a life estate in what remained after his debts should have been paid. She took a life estate "subject to the following eight articles." One of these very articles denies her any allowance as a widow and any commissions as an executrix, but limits her to such sums for

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maintenance as she should claim. This is utterly inconsistent with the idea that she had an absolute life estate in the realty, but is in strict accord with his paramount purpose of paying, at all events, his debts. Under clause 5, dealing with his personal estate, she was not to have the personal estate for life in an absolute sense—that is to say, if she sold it and converted it into money, she could not take the interest on the money, but the whole proceeds were to be covered into his estate for the use of the will. How it is possible for the testator to manifest more emphatically a proud-spirited purpose to pay, first of all, and at all events, his debts, than this testator here has manifested for that purpose—first by a provision directing his wife, if she sold the personal estate, to cover the proceeds into his estate for the uses of the will; secondly, by a provision that she shall have a life estate in the realty, subject to clauses looking to the payment of debts; thirdly, by a clause actually denying to his wife either an allowance or commissions, and limiting her to mere maintenance—we cannot comprehend. Add to this an annuity for the indefinite term of the life of the annuitant; provisions looking to the indefinite cultivation of farms, and the payment of debts out of the crops; the full power of public or private sale of real or personal property, in the absolute discretion of the executors, for the payment of debts, coupled with the further power to make title to the purchasers, and how widely different this case is from *Gwin* v. *Nettles* (Miss.), 18 South., 798, must appear at a glance. It may be remarked that, if Mrs. Baldwin took an absolute life estate, these exceptors would have no standing to question her disposition of the income. *Byrd* v. *Wells,* 40 Miss., 711; *Henry* v. *Henderson* (Miss.), 33 South., 961. But we agree with the learned counsel for the appellees that she did not take a life estate, except in what was left after debts should have been paid. We draw from this, however, a very different conclusion from that reached by learned counsel for appellees. To our thinking no more supremely significant declaration of his purpose that his debts should be paid at all events could

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Statement of the case.

have been furnished by Mr. Baldwin than he does furnish us in this clause, limiting even the life estate devised to the wife to so much only as should remain after the payment of all debts.

We are clearly of the opinion, without protracting these observations, that Mr. Baldwin's will created an express trust for the payment of his debts, and consequently that, under § 1838, Code 1892, as well as the general principles applicable to such trusts, the statute of limitations invoked against these unprobated claims is no bar, and the executors were fully justified in the payment of the same. We have made no extended reference to authorities, since they have been very ably collected in the briefs on both sides. The principles announced in the cases of *Perkins* v. *First Nat. Bank of Yazoo* 81 Miss., 358; s. c., 33 South., 18, and *Abbay* v. *Hill,* 64 Miss., 340 (1 South., 484), cover the case perfectly. See also *King* v. *Bishop,* 62 Miss., 555, and Story's Equity Jurisprudence, sec. 980.

The decree is reversed, and the cause remanded to be proceeded with in acordance with this opinion.

Reversed.

LEWIS C. WELLBORN, USE, ETC., *v.* FREDERICK MULLER.

MUNICIPALITIES. *Surveys. Town lots. Plats. Failure to record. Sales. Penalty. Code* 1892, § 4403. *Construction.*

Code 1892, § 4403, imposing a penalty for selling lots in a municipality, or subdivision thereof or addition thereto, thereafter laid out, without first having a plat thereof prepared and recorded, has no application to a municipality incorporated before it became operative nor to private surveys made before that time.

FROM the circuit court of, second district, Marion county.

HON. WILLIAM T. MCDONALD, Judge.

Wellborn, the appellant, suing for the use of Marion county, of which county he was the chancery clerk, was plaintiff, and

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Opinion of the court.

Muller, appellee, was defendant in the court below. From a judgment in defendant's favor the plaintiff appealed to the supreme court.

The town of Purvis was incorporated in 1888, and elected to come under the code chapter on "Municipalities." Appellee, Frederick Muller, owned a tract of land in the municipality. Before he bought the land some one had a part of these lands, which were afterwards embraced in the municipality of Purvis, mapped and platted and laid off in town lots. This map was never recorded. Some time in 1902 appellee sold some of these lots in said town by reference to the map so made. This is an attachment suit brought by appellant against appellee, who is a nonresident, to recover the penalty of $200 prescribed by § 4403, Code 1892, for selling lots in the town without first having the map recorded. This case was tried in the court below before the judge, a jury having been waived.

C. G. Mayson, for appellant.

Fewell & Son, for appellee.

[The reporter has been unable to find the briefs of counsel in this case.]

TRULY, J., delivered the opinion of the court.

Section 4403, Code 1892, provides for the imposition and collection of a penalty from any person who shall sell lots in any town or subdivision thereof or addition thereto "hereafter laid out," who shall not first have a plat thereof prepared in the manner required by law and duly recorded. This statute was intended to deal with towns subsequently incorporated, or with additions to such towns surveyed and platted after its enactment. It has no application to plats of towns which were previously incorporated, even if such plats were not duly recorded, and it has no reference to private surveys made prior to its passage. Being a statute of highly penal character, it must be strictly construed.

Affirmed.

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Opinion of the court.

ALLEN WILSON *v.* AGNES WOOD.

1. LANDLORD AND TENANT. *Dispossession. Termination of tenancy. Notice to quit. Code* 1892, § 2544.

Where land is leased by the month, to continue for an indefinite period, the tenancy can only be terminated at the end of a monthly term upon one week's previous notice in writing, under Code 1892, § 2544, providing for one week's notice in writing in order to terminate a lease by the month.

2. SAME. *Summary proceedings to remove tenant. Nonpayment of rent. Code* 1892, § 2547.

In order for a landlord to succeed in a suit to summarily remove his tenant from leased premises for the nonpayment of rent, under Code 1892, §§ 2547, *et seq.*, so providing, it is necessary for the affidavit and proof to show:

(*a*) That the rent was past due and unpaid.

(*b*) That three days' notice in writing requiring payment had been given to the tenant; and

(*c*) That the rent could not be made by distress of the tenant's goods.

FROM the circuit court of Warren county.

HON. GEORGE ANDERSON, Judge.

Mrs. Wood, the appellee, was plaintiff, and Wilson, the appellant, was defendant in the court below. From a judgment in plaintiff's favor the defendant appealed to the supreme court.

Green & Green, for appellant.

McLaurin, Armistead & Brien, for appellee.

[The reporter has been unable to find the briefs of counsel in this case.]

TRULY, J., delivered the opinion of the court.

This proceeding was instituted before a justice of the peace, under § 2547, Code 1892, to remove a tenant from the leased premises. Appellee filed an affidavit reciting that she was the

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Opinion of the court.

owner of a certain lot therein described; that, as landlord, she had rented the same to appellant by the month at $6 per month from 1st January, 1901; that the tenant had wholly neglected to pay any rent, and there was due her $30, which the tenant refused to pay; that on the 16th day of May she notified the tenant, in writing, to pay the amount due for rent, or vacate the premises, but he refused to do either, wherefore she asked for issuance of proper process. This affidavit was subscribed and proceedings begun on the 23d day of the same month in which the notice to vacate was averred to have been given. Summons was issued as provided by law, and appellant made defense by filing denial under Code 1892, § 2552.

The drastic remedy granted by Code 1892, § 2547, can only be invoked in two classes of cases: (1) When the tenant wrongfully remains in possession of any part of the demised premises after the expiration of his term; (2) after default in the payment of rent pursuant to the agreement under which the premises are held, when satisfaction of the rent cannot be obtained by distress, and three days' notice in writing, requiring payment of rent or possession of premises, shall have been served on the tenant. The case made by this record cannot be sustained under either clause of the section on which it is based.

1. It cannot be sustained on the theory that the tenant was wrongfully holding possession after the expiration of his term, because the affidavit states explicitly that the letting was "by the month." As the term was not to expire at a fixed time, notice was, under § 2544, Code 1892, a prerequisite to the termination of the tenancy; and, while the affidavit so states, upon the trial in the circuit court the appellee failed to prove that any notice to quit the demised premises had been served on appellant. Again, the affidavit explicitly states that notice to vacate was given on the 16th inst., and the record shows that proceedings to remove were begun on the 23d of same month. If based on the first clause of the section, the suit was prematurely commenced. Where the letting is "by the month," to

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continue for an indefinite period, according to the wishes of the contracting parties, the tenancy can only be terminated at the end of the monthly term then pending, upon notice duly given. This is the evident intent of the law. *Usher* v. *Moss*, 50 Miss., 208.

2. Nor does the case fall within the second clause of sec. 2547. If the proceeding is to remove a tenant holding over after default in payment of rent pursuant to the agreement under which the premises are held, then the affidavit must recite, and these recitals must be sustained by competent proof at the trial, that the rent, as stated, was past due; that three days' notice in writing was given, requiring payment; that the rent was not paid, and could not be obtained by distress of goods. The record here discloses that these requirements were not met by appellee on the trial in the circuit court. One invoking this harsh and summary statutory proceeding must strictly comply with every provision of law applicable thereto.

As these vital questions lie at the very threshold of our investigation, we do not pass upon or consider the several exceptions to the rulings of the court made during the progress of the trial.

Reversed and remanded.

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Opinion of the court.

ALBERT GERARD, TAX COLLECTOR, v. BENJAMIN C. DUNCAN.

1. TAXATION. *Insolvent bank. Assignment. Duty of assignee. Code* 1892, § 3755.

Under Code 1892, § 3755, providing that every taxpayer, when requested, shall make out and deliver to the assessor a true list of his taxable personal property, held in his own right or as trustee or otherwise, on February 1st preceding, the notes and solvent credits of an insolvent bank, passed to an assignee by a general assignment before February 1st in any year, are taxable in the hands of the assignee and he should render them to the assessor.

2. SAME. *Double taxation.*

The fact that the creditors of an insolvent bank, whose solvent credits are taxed in the hands of an assignee, have the debts due them from the bank assessed against them does not constitute double taxation.

FROM the chancery court of Grenada county.

HON. JULIAN C. WILSON, Chancellor.

Duncan, the appellee, was complainant, and Gerard, tax collector, appellant, the defendant in the court below. From a decree in complainant's favor the defendant appealed to the supreme court. The facts are fully stated in the opinion of the court.

S. A. Morrison, for appellant.

William C. McLean, for appellee.

[The briefs of counsel in this case could not be found by the reporter.]

TRULY, J., delivered the opinion of the court.

The bill of complaint herein was filed by B. C. Duncan, assignee of the Merchants' Bank of Grenada, Miss. The bill discloses the following state of facts: On the 26th day of January,

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Opinion of the court.

1903, the Merchants' Bank of Grenada, Miss., a corporation of this state, executed, through its proper officers, a general assignment, in which the following provision occurs: "The said party of the first part hereby conveys, warrants, sells, transfers, assigns, and sets over unto said party of the second part all of its property of every kind and character, real estate, all moneys, notes, accounts, choses in action, bills receivable, and any and all other property of every kind and character and wherever situated that belongs to said party of the first part." On the same day the said B. C. Duncan, assignee, as required by law, filed a petition to the chancery court setting up the general assignment executed by the bank; stating that it was valid and legal and executed in good faith, and that the estimated value of the property assigned was the sum of $125,000. With said petition the said assignee filed a bond, as receiver, for the sum and conditioned according to law, and in full compliance with ch. 8, Code 1892. The bill further recites that the assets of the bank so conveyed were insufficient to pay in full its creditors, and that the total amount of the indebtedness of the bank was the sum of $99,227.39, the assets being much less than this amount. Further, that A. Gerard, marshal, as assessor and tax collector of the city of Grenada, had on a day subsequent to February 1, 1903, assessed the said Merchants' Bank (B. C. Duncan, assignee) with the sum of $36,000 for money and solvent credits; that the shares of stock of said bank were of no value whatever, and that neither the bank nor the holders of the shares of its capital stock were liable for taxes for the year 1903; that the solvent credits and notes which were in the possession of the assignee were in fact the property of various parties, many of whom lived outside of the city of Grenada, and therefore were not liable to be assessed for municipal taxes by the said city; that the said tax collector claimed that there was due to the city the sum of $504, municipal taxes levied upon the said sum of $36,000 for the year 1903, and unless restrained by the court would proceed to enforce the collection

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Opinion of the court.

of said sum, wherefore an injunction was prayed for and granted by the court. The bill of complaint was sworn to and filed on the 3d of January, 1904, by B. C. Duncan, assignee and receiver, and process and injunction were issued as therein prayed. To this bill a demurrer was filed upon the ground that there was no equity on the face of the bill, and that it presented no cause of action against the defendant. Upon the presentation of the demurrer, in addition to the facts stated in the bill of complaint, it was agreed that the personal assessment roll of the city of Grenada showed the following assessment, "Merchants' Bank, B. C. Duncan, assignee;" that the city was authorized to levy and collect taxes on every description of property whatsoever, and that the marshal was clothed with the same power and authority in reference to the assessment and collection of taxes as were conferred by the law upon the assessors and tax collectors of state and county taxes. The demurrer to the bill was overruled, and from that interlocutory decree an appeal was granted the tax collector.

It is contended on the part of the appellee that, under our state laws devising a special scheme for the taxation of banks, only the value of the shares of the capital stock of each bank is assessed—these being assessed against the bank itself—and that the same rule governs the assessment of banks, whether the bank be a state or national institution. So it is said in the instant case, as the bill of complaint expressly avers the utter worthlessness of the shares of capital stock, and as this averment is by the demurrer admitted to be true, the shares of capital stock—the property which the law requires to be assessed—being confessedly worthless, there was nothing to assess, and no means whereby any estimate of valuation could be arrived at, and therefore the demurrer was properly overruled. The case of *Rosenblatt* v. *Johnston,* 104 U. S., 462 (26 L. ed., 832), is relied on as authority for this position. We are unable to see that the rule announced in that case can in any wise control under the facts disclosed by this record. There is a difference

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Opinion of the court.

in the method pursued in dealing with the assets of a national bank, which may or may not be insolvent, after being placed in the hands of a receiver, and the legal principles governing the collection and distribution of the assets lately belonging to an avowedly insolvent state bank. But it is not necessary for us to enter upon any general discussion of this subject or to consider anything but the one question of the liability to taxation of the assets or property of such institution while in the hands of a receiver and before final distribution of the proceeds. All that appellee contends for in reference to the assessment of banks may be conceded. It may be granted, if the shares of the capital stock of a bank are worthless, or are worth less than par, that it is the intent of the law they should be assessed only at their real value. In the instant case no effort is made to assess the capital stock of the Merchants' Bank of Grenada, nor to assess solvent credits and notes as the property of that bank. Under the facts stated in the bill, and as they appear in the general assignment, the Merchants' Bank of Grenada was not at the date of the assignment the owner of any of the property which was assessed by the tax collector of the city of Grenada and which forms the subject of this litigation. As shown by that assignment, the bank had voluntarily and absolutely divested itself of all claim to the control or ownership of any property, and the petition of the assignee shows that the estimated value of the property conveyed to him was $125,000. It will be noted that this transfer of property was made on the 26th of January, 1903, before it was proper, under our fiscal scheme, to assess any property for taxation for that year and when in fact no property was liable to taxation. Section 3748, Code 1892, provides that "all taxable property held by any person before the first day of February shall be assessed and taxes thereon paid for the current year." Property is assessed for purposes of taxation to the person legally holding the same on the 1st day of February annually. On this day of the year 1903 the bill of complaint affirmatively shows that the property

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in question was legally in the possession of B. C. Duncan, assignee of the Merchants' Bank of Grenada. Under such circumstances it could not have been rightfully assessed to the bank for the current year, for the manifest reason that the bank had ceased to be the owner before the property became liable to assessment for that year. And this fact sharply accentuates one distinction as to the assessment and taxation of its assets between the legal status of an insolvent state bank after disposing of its assets by general assignment, and a national bank whose assets and affairs have been placed, by order of the comptroller of the treasury, under the control of a receiver. The former has voluntarily divested itself of title. The latter remains a legal entity, retaining the legal rights to its assets, subject, however, to the control and management of another officer. The stock of the one is not assessed, because valueless, and because its property has passed into other hands. The stock of the other, "if the shares have any value," "are taxable in the hands of the holders or owners," because it still has possession of the property, and the basis upon which the value of the stock is calculated. *Rosenblatt* v. *Johnston, supra; Bank of Bethel* v. *Pahquioque Bank,* 14 Wall., 398 (20 L. ed., 840).

It is the policy of our law, repeatedly expressed, that all property not specially exempted shall bear its just proportion of taxation. Therefore the only further inquiry presented by this record is, To whom should the property have been assessed on the 1st day of February, 1903, or, if overlooked at that time, upon a subsequent day? The answer is furnished by § 3755, Code 1892, in the following words: "Each person shall, when required, make out and deliver to the assessor a true list of his taxable personal property, with the value of each article, specifying all such property of which he was possessed on the 1st day of February preceding, in his own right, or in the right of his wife, or as executor, administrator, guardian, trustee, or otherwise, rendering separate lists of the property of each." Therefore it was the duty of B. C. Duncan, when required by

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the proper assessor, to have filed a list of all property which he was possessed of on the 1st day of February preceding, as assignee of the Merchants' Bank of Grenada; and, failing to do this, it was the duty of the assessor of the city of Grenada to assess said property, as property having escaped taxation, at the fair value thereof.

We see no force in the argument of appellee that this property was not properly assessed to the assignee, because, as solvent credits, it belonged to numerous persons, many of whom resided without the corporate limits, and beyond the taxing control, of the city of Grenada. Assuming that it was the duty of all the creditors of the bank to assess their proportion in the assets of said bank upon their individual assessment as "indebtedness probably collectible," and this was in fact done, still it would not constitute double taxation, and would not render this assessment invalid. It is certainly settled in this state, beyond cavil or disputation, that the person being lawfully possessed of property must list the same for purposes of taxation, and the mere fact that such property in some wise represents an indebtedness which is also due to or by another person does not relieve it from this burden. Besides, in the case at bar the creditors of the Merchants' Bank were not the owners of the notes and solvent credits assesssed to the assignee. They were simply entitled to share ratably in the proceeds thereof under the terms of the assignment.

Without reference, therefore, and without deciding the true rule as to the assessment of shares of capital stock of banks, whether state or national, where the market value thereof is less than their face value, it is manifest to our minds that the assessment in the instant case was lawful and must be upheld.

Wherefore the decree is reversed, the demurrer sustained, and the bill dismissed.

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Statement of the case.

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BARATARIA CANNING COMPANY v. JOSEPH OTT ET AL.

1. WATERS. *Lands bounded by sea. Owner's rights. Fishing. Oyster taking.*

In the absence of an express statute the owners of land bounded by the sea possess no exclusive right to the soil under the water beyond high water mark, and they have no greater right than others of fishing and gathering oysters from natural beds in front of their property.

2. SAME. *Code* 1880, § 956. *Code* 1892, § 3080, *et seq.*

Code 1880, § 956, granting the board of supervisors of the counties bordering on the Gulf of Mexico jurisdiction in the matter of the protection and preservation of oysters growing and being grown within the limits of their respective counties and with power to grant private rights of property in oysters banked, planted, or cultivated in the waters of the county, is constitutional, and a private right to bank, plant, and cultivate oysters in the waters of the sea, within the limits of the county, acquired from the board of supervisors under said statute, is valid.

3. DEEDS. *Reservations.*

In order for a reservation in a deed to be operative it must withhold from the grant something which would have passed by the deed but for the reservation.

4. SAME. *Construction.*

In construing a reservation in a deed it is not competent to show by evidence *aliunde* the intention of the parties, as the deed speaks for itself; and if the reservation be so indefinite as not to convey any certain meaning, it will be ineffectual.

FROM the chancery court of Harrison county.

HON. STONE DEAVOURS, Chancellor.

Ott and others, appellees, were complainants in the court below; the Barataria Canning Company, appellant, was defendant there. From a decree favorable to complainants the defendant appealed to the supreme court. The facts are fully stated in the opinion of the court.

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Brief for appellants.

Harper & Harper, for appellants.

It is as elementary that the state of Mississippi owns all the land under the tide waters within her borders, except where she has parted with the title by grant, as it is that the United States owns all the land within this state, except where it has parted with the title by grant or otherwise. See *Smith* v. *Maryland,* 18 How. (U. S.), 74. It is equally as elementary that the state of Mississippi has complete dominion over the waters covering these lands, subject only to the paramount right of navigation, and such dominion includes the right to grant to a resident individual, a nonresident individual, a corporation, a partnership, or whomsoever it may choose, the right to a several fishery over any designated space of land covered by tide water, either for a term of years or forever, and which right of several or exclusive fishery may apply either to the floating fish, shell fish, or both. *McCready* v. *Virginia,* 94 U. S., 394; *State* v. *Harrub,* 95 Ala., 176.

It follows that an exclusive fishery in tide waters can be acquired in but two ways—by grant from the state, or by prescription which presupposes a grant from or through the sovereign; a claim to a several fishery through any other source is nugatory and void.

The legislature of the state of Mississippi has delegated its exclusive power over its fisheries to quasi-corporations—namely, the board of supervisors of the several counties of the state—from time to time, as have a majority of the other states of the union, which right to delegate this power has never been questioned by any reputable authority.

Appellant claims title under the board of supervisors of the county.

It is not possible for the writer to understand, from the pleadings, from the evidence, or from argument of opposing counsel in the court below, how the appellees claim title, but the following are the only ways in which they might have acquired it: First—By grant from the state of Mississippi. No such grant

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was offered in evidence. Second—By prescription. No effort was made by them to show anything that would presuppose a grant. Third—By a transfer to them by this appellant.

Did these appellees acquire title to any part of this bedding ground by the deed of October 1st, 1903? Oral testimony was introduced by these appellees to explain this deed, which was written by their own counsel, the leading counsel of this court for the opposition; and the defendants in the court below and the chancellor, by reason of this incompetent evidence, then and there entered into a new contract and reformed the deed, so to speak, on behalf of the Barataria Canning Company, without its consent.

It is shown by this evidence, which the court will not consider, that the Barataria Canning Company had leased from Peter and Mary Ott, the then owners, a small property, for a period of twenty-five years, at a rental of one hundred and fifty dollars per annum, upon which the appellant erected a canning and packing plant, valued at seventy-five thousand dollars; that in 1902, this appellant, knowing that the lease to the land would expire at no distant day, and being desirous of continuing its business, sought these appellees and endeavored to obtain another lease for a like period. After almost a year's effort in this direction, it was found that no lease could be had. As a last resort it was suggested that the Otts, the appellees, would name some price for which they would sell the property, that the officers of the Barataria Canning Company would have no further conversation with them whatever, in and about the territory that they would sell to them. The appellees were to name the price in a deed. They were to make this appellant a proposition of sale by having this deed prepared by their own counsel, to be placed in escrow, after which placing, the officers of the appellant company were to take the matter up and consider the deed, and if the terms and conditions of the deed were satisfactory, the appellant company was to pay the price named in the deed, and the same was to be delivered. This oral evi-

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dence shows that this appellant corporation knew absolutely nothing of the contents of this deed until it was placed in escrow, having never seen it. All these things were done, the deed was placed in the hands of A. B. Austin in escrow, a copy of the same was furnished this appellant company, the terms and conditions were considered, the price was paid, the instrument was legally acknowledged, signed, sealed, and accepted by the corporation without any officers of the company having ever seen or conversed with these appellees from the beginning of the negotiation of sale until it was completed.

By every rule of construction the deed of October 1st, 1903, must be considered alone, without the aid of oral testimony, and most strongly against the grantors.

The first reservation says, "Any and all littoral and aquatic rights and privileges appurtenant and attached to said land or vested in the grantors as the owners of said land are hereby expressly reserved so far as said privileges lie to the eastward and northward of that certain line which had its beginning point on the Bay of Biloxi," etc.

It is of no concern in this litigation to this court what the term "littoral and aquatic rights" embraces; further than to determine whether the term embraces the right to bank, plant, and cultivate oysters, such a term could not have been so construed, but certain it is when qualified by "appurtenant to the land conveyed and retained or vested by law in the owners of said land," the oyster bedding ground, which is not appurtenant to the land conveyed and retained or vested by law in the owners of said land, the term cannot have the force and effect to divest such a bedding ground out of the grantee and invest the grantors with it. The title to this bedding ground has never been appurtenant to the land involved; it has never been attached to it; it has never been vested in these appellees; it was never vested in their ancestors. The state is the owner in fee to this property, it always has been, and, until it is granted by the legislature, will remain in the state subject to the lease made through the

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Brief for appellants.

legislature to the appellant company, which lease expires by limitation in a few years.

The third and only other clause which the writer wishes to call the attention of the court to the deed of October 1st, 1903, reads as follows: "It being the purpose of this instrument to grant to the Barataria Canning Company all such littoral and aquatic rights and privileges appurtenant and attached to said land or vested in the said grantors as owners of said land as may be exercised wholly to the westward and southward of said line so established."

If the contention of the appellees should be right, they attempted to sell to this appellant that which it already owned. Can counsel seriously contend that the appellant acquired title to that part of the bedding ground which lies north and west of the conventional line aforesaid and east of the Lugenbuhl property and north of the channel, by deed of October 1st, 1903? Such an idea is absurd.

Miller & Doty, on the same side.

Neither the motives nor the understanding of the defendants, not provided for in their deed, can be regarded any more than the understanding of the complainant when it made the purchase. Nor can the alleged representations made to the board of supervisors to obtain the concession, under which the complainant acquired the oysters, be considered.

It is enough that under the law as it stood the complainant secured the right to plant and cultivate oysters for a period which has not expired. It is not denied that it did own the oysters so planted and had the right to take them, or that it was in the full exercise of that right up to the 1st day of October, 1903, when it purchased a piece of the shore embracing its factory, plant, and building ground, and cancelled its previous lease.

The claim of the defendants springs entirely from their own conveyance of the southern portion of their front land, the can-

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cellation of a pre-existing lease of a portion, and the language employed in their reservation. If the complainant has surrendered its property and rights to the defendants, it certainly has not done so by any express terms, and, as we submit, not by any fair implication.

We have as much right to say the complainant would never have paid six thousand dollars for the little piece of front land, if by conceding aquatic and littoral rights, east and north of their most eastern or northern boundary line, it was expected to make over to defendants its costly property beneath the waters on ground subject alone to the state's dominion and exercised through a local authority; as the defendants have to say, they never would have sold for six thousand dollars if they had not expected to get this property of complainant.

If they had that purpose in view and expected the complainant so to understand it, it is rather odd that instead of essaying to reserve such littoral and aquatic rights as might pertain to the owner of the shore conveyed, they did not provide expressly in the deed they put in escrow, as part of the consideration, that the complainant made over to them its oysters beyond their shore line with the exclusive right to take the same.

There are two fallacies in the defendants' case, either one of which, being shown, is sufficient to defeat them. The first is in supposing that complainant's right, acquired from the board of supervisors, was "littoral and aquatic" in the enlarged sense of their understanding and depended entirely on the circumstance that its assignors had acquired a lease from defendants' ancestor and must cease with the termination of that lease. This supposition of theirs grows out of the notion that according to the laws in force in 1885, the riparian owner alone was entitled to a concession of oyster privileges, whereas there was no such restriction upon the powers of the board, the only advantage the riparian owner had in his "littoral" rights over others was when he should be ready to land his catch.

The second fallacy of defendants is in supposing that a trans-

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Brief for appellees.

fer of property in the oysters arose, by implication, from the reservation by defendants of all such "littoral and aquatic" rights and privileges as belonged to the owner of the front land and the agreed disclaimer on the grantee's part of any right to exercise "littoral and aquatic" rights to the east and north of the line referred to.

Title to property, not even mentioned, does not pass from the grantee in a deed to the vendor by a reservation in favor of the latter of some portion or appurtenance of or to the property conveyed which the parties think might, without the reservation, be embraced. The reservation presupposes, of necessity, that the thing reserved belongs to the vendor, and the object of its insertion is to assure its retention and to prevent dispute regarding the limit or effect of the grant.

Ford & White, for appellees.

This is a controversy as to the exclusive right (which is claimed by both appellant and appellees) of fishing and planting oysters in the water front appurtenant to that certain lot of land extending from Little Cove, on the Bay of Biloxi, to a point three hundred and sixty-five feet east of the eastern line of the lot known as the Lugenbuhl property.

The chancery court, having taken jurisdiction, has jurisdiction for all purposes, and hence we contend: First—If appellees' right to plant, cultivate, and catch oysters in the waters in question, or any part thereof, is superior to that of appellant, then the demurrer to the cross-bill was properly overruled. Second—Unless appellant had exclusive right as against appellees to plant, cultivate, and catch oysters on said premises, and every part thereof, then the motion to dissolve the injunction was properly sustained.

Under the common law a right of property in fish attaches to those reduced to actual possession and manucaption, but when they are returned to their native element they become a part of the common stock belonging to the public generally, and

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the same rule applies to oysters and shell fish so far as it relates to the manner of acquiring a right of property in those caught. But oysters, having no power of locomotion, may be returned to the water without losing the right of property in them, provided they are not abandoned or mingled with other oysters growing either on a natural oyster reef or private bedding grounds; hence the rule is well settled that a citizen may acquire an exclusive property in oysters by planting them in beds where no oysters are growing, and the right of ownership is not restricted to the oysters planted, but extends to and embraces the offspring of the parent oysters which remain on the beds; and when he has thus acquired title in oysters, other persons cannot impair his title by planting other oysters in the same place. 12 Am. & Eng. Ency. Law (2d ed.), 566.

The cross-bill alleges, and the proof taken on the motion to dissolve the injunction shows, that prior to 1885 the Otts had planted large quantities of oysters in the waters in dispute, which oysters were scattered "from high water mark all the way out," as testified to by witness McCaleb; so that at the time of the lease of the premises in dispute, "with all its privileges and appurtenances of fishing and bedding oysters," the Otts had a property right in the oysters in said waters, together with their increase, which amounted to an exclusive right of fishing and planting oysters therein, which right, by said lease, was transferred to the grantors of appellant for twenty-five years; and the board of supervisors, recognizing this lease and making special reference to it, attempted to secure to them that property right in the oysters so planted, which they already had.

Up to 1886 the riparian owner, like any other person, could only acquire an exclusive right in navigable waters by planting first where there were no oysters growing, as was done by the Otts, but by the acts of 1886 (page 180) the exclusive right to plant oysters in front of their property was conferred upon the riparian owners up to, but not across, the channel. The code of 1892 is a repetition of the acts of 1886. The acts of 1896 give

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Brief for appellees.

the exclusive right to plant oysters in front of their property to the riparian owners, but limit this right to waters within one thousand yards of the shore. The act of 1902 is a repetition of the act of 1896, except that the limit is fixed at five hundred yards.

These several acts served to give the exclusive right to riparian owners who had not acquired it under the common law by taking possession; but they did not operate to deprive any riparian owner of any right already acquired.

The Otts, having first acquired the exclusive right by virtue of their having planted the shoal waters in front of their property in oysters, leased this right to appellant's grantors. The next year the legislature, by act above mentioned, gave to the riparian owner the exclusive right to plant oysters in front of his property. The right of the Otts under this statute inured to the benefit of their lessees, so that appellant's grantors acquired the exclusive right to plant and catch oysters on the premises in controversy during the term of said lease; and appellant, under these conditions, cannot be heard to set up a title adverse to that of its lessors under whom it went into possession.

The license, or permit, granted to appellant's grantors in 1895 by the board of supervisors, was made under § 956, Code 1880, which gave to the board of supervisors the power to "protect and preserve" oysters growing in a "state of nature within the territorial limits of each county respectively," to regulate times and places for taking same, and "to secure a private right of property in oysters banked, planted, or cultivated in the waters of the county," and this was the limit of the power given to boards of supervisors by that section; and any attempt by the board to grant a lease for a term of years, or to do more than to grant a right of property in oysters planted, which right of property existed at common law, provided the oysters were not mingled with others, was *ultra vires* the power delegated to the board, and was void under the rule of construction of powers

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granted to boards of supervisors adopted in *Jefferson County* v. *Grafton,* 74 Miss., 435. The title to the land covered by tide waters is in the state in trust for all the people of the state, and the order of the board of supervisors, under which appellant asserts title, was a mere license at most, and was repealable at will by either the board of supervisors or legislature. *I. C. R. R. Co.* v. *Illinois* (Lake Front case), 146 U. S., 387.

We submit that the only claim appellant ever had to the premises in controversy was that acquired from the ancestors of appellees, under the lease from Mary and Peter Ott, and that their rights in said premises were recognized by appellant in its contract of October 14th, 1903, in which it relinquished to appellees all its rights in the waters in dispute, and which effectually estops it to assert title thereto against appellees.

The only claim asserted by appellant in the court below seemed to rest upon an imaginary, finely drawn distinction between "aquatic rights," "riparian rights," and the right to plant, cultivate, and catch oysters, whereby appellant sought by a play upon terms to escape the effect of its contract, after having received the consideration.

With the factory of appellant situated as it was on this land and the lease about to expire, appellees could have named their price for this lot, and they testified that they never would have sold it for six thousand dollars or any other sum without the retransfer to them of the unexpired lease of, and without retaining the title to, the bedding ground, and that this was a part of the consideration for the sale to the Barataria Canning Company of the lot upon which its factory is situated.

We submit that the action of the chancery court was correct in refusing its sanction to this effort of appellant to avoid the real intent and purpose of its contract by a restricted and narrow construction of its language, and that the decree dissolving the injunction and overruling the demurrer to the cross-bill should be affirmed.

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Opinion of the court.

TRULY, J., delivered the opinion of the court.

On the 12th day of February, 1885, Peter W. Ott and wife, ancestors of appellees, leased to Simon Gumbel and others, assignors of appellant, certain property, being a lot at Point Cadet, in the town of Biloxi, fronting on Mississippi Sound or Gulf of Mexico, therein described. Said lease contains the following cause: "Said lessors also demise, lease, and to farm let unto said lessees, but also without power to sublet unless by consent of lessors first had, all the exclusive right of the said lessors to the water front on said sound or gulf of all lands owned by said lessors, extending from eastern boundary of said Lugenbuhl property around to the staked point known as Little Cove. Said point being indicated by a stake at the south entrance or beginning of a place called Little Bay in Biloxi Bay: said water front herein demised in its extension into said gulf and with all its privileges and appurtenances of fishing and bedding oysters to be extensive with the rights of said lessors under the laws governing the same"—the lease of said land, water front, and privileges being for twenty-five years from date. Subsequently, at the March term, 1885, the board of supervisors of the county of Harrison, in which the rented property was situate, adopted an ordinance by which the said Gumbel *et al.*, lessees in the contract from Ott, were granted for a term of twenty-five years the "right to bank, plant, and cultivate oysters in the Mississippi Sound within the limits of the entire front of the land formerly owned by Peter W. Ott and Mary E. Ott, his wife, and by them rented to the above-named parties, with all the water privileges as described in said lease;" and the water in which the right to plant and cultivate oysters was granted is fully described in the ordinance of the board of supervisors as being in front of the lands mentioned in the lease from Ott, and its extent and boundaries clearly defined by channel and county lines. Said ordinance provides further that the said grantees' "right of property in the oysters so bedded, banked, and planted is hereby established within said limits in

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said waters in the county of Harrison." The rights acquired by Gumbel *et al.*, under the lease from Ott, and by virtue of the ordinance of the board of supervisors, were subsequently, with the consent of the lessors, assigned and transferred to the Barataria Canning Company. The said company entered into possession thereof, and thereafter built an extensive canning factory on the lot demised, and bedded, banked, planted, and cultivated oysters over the entire space of water described in the ordinance hereinbefore referred to, planting many barrels of shells annually and building up a very extensive and valuable oyster bed. For many years after the date of its entry the appellant operated a canning factory upon the lot so leased, taking from the oyster bed which it had planted the necessary supplies to enable it to continue its business of canning oysters. This mode of business continued uninterruptedly until October, 1903, when, after considerable negotiation, a deed was executed by appellees to appellant, in which the following provisions are found: "For and in consideration of six thousand dollars cash paid and the further consideration of the surrender and cancellation of a certain lease heretofore executed by Peter W. Ott and Mary E. Ott, now of record in the chancery clerk's office in the said county, book 20, on pp. 307, 308, and in further consideration of the mutual and reciprocal covenants concerning the littoral and aquatic rights and privileges appurtenant to the land conveyed and retained or vested by law in the owners of said land by reason of said ownership," the grantors conveyed a certain lot therein described, being the same on which the canning factory of appellant was situated. After describing the lot, the said deed continues:

"The above described land is hereby granted in fee simple with the following reservations and none other:

"First—Any and all littoral and aquatic rights and privileges appurtenant and attached to said land or vested in the grantors as the owners of said lands are hereby expressly reserved so far as said rights and privileges lie to the eastward and northward

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of that certain line which has its beginning point on the Bay of Biloxi, and running thence in a southwardly direction to the center of the channel of the said Bay of Biloxi, and established in the following manner:

"Beginning at the northwest corner of lot number 2, of square number 5A, according to the plan of said Summerville, so recorded as aforesaid, and running thence due east 230 feet to the beginning of said line; thence angling right 70 degrees and 23 minutes, bearing south 19 degrees and 37 minutes into the water and toward Deer Island.

"It being the purpose of this instrument to grant to the said Barataria Canning Company all such littoral and aquatic rights and privileges appurtenant and attached to said land or vested in the said grantors as owners of said land as may be exercised wholly to the westward and southward of the said line so established, and this grant is made irrespective of what the actual conformation of the shore line may be or become; and it is expressly understood that the said Barataria Canning Company, by its aceptance of the grant evidenced by this instrument, shall for itself, its legal representatives, and its successors in interest disclaim any right or claim to the exercise of any littoral and aquatic rights and privileges appurtenant and attached to said land or vested in the grantors as the owners of the said land to the northward and eastward of said line so established, no matter what the actual conformation of the shore line may be or shall be or become or be made, and the respective concessions and disclaimer here made by the parties hereto each in favor of the other shall be held and understood as reciprocal and as furnishing mutual consideration each for the other."

After the execution and delivery of this deed, the appellees, claiming that, by virtue of the stipulations and reservations contained therein, they had acquired the right to gather oysters in all the waters lying to the east and north of the line described in said deed, entered upon the said waters, sent schooners fully equipped with crews and necessary dredges and tongs used in

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Opinion of the court.

the gathering of oysters, and caught, took, and carried away, disposed of, and converted to their own use, large quantities of oysters from the beds so banked and planted by the appellant in the waters described and granted by the ordinance of the board of supervisors. Several suits were filed by the appellant, and the appellees warned to keep away, and not break or enter the close of the appellant as therein described; but appellees failed to heed the warning, refused to cease their operations, and openly announced their intention of continuing to gather oysters in the manner and from the beds as they then were, whereupon the appellant filed its bill of complaint, asking that the appellees be enjoined and restrained from further trespass upon the premises and waters described, and from gathering oysters from the beds so banked and planted by the appellant. Appellees filed an answer to the bill of complaint, admitting the fact of the lease and occupancy by appellant, but denying that it acquired any exclusive right by virtue of the ordinance adopted by the board of supervisors. Making their answer a cross-bill, appellees averred that they were entitled, under the terms of the deed which they had executed to the Barataria Canning Company in October, 1903, and the cancellation of the lease made by that deed, to the exclusive right of gathering oysters from all that part of the Bay of Biloxi which lies to the northward and eastward of the line agreed upon by the parties as stated in the deed; that the effect of the stipulations and reservations in the deed was to vest in appellees all rights to the oysters which were bedded, planted, or growing in the water described, and that the Barataria Canning Company, by accepting the deed in question, expressly "abdicated and abandoned all its littoral and aquatic rights in and to the waters lying to the northward and eastward of said line agreed upon;" that one of the "main inducements and primary considerations" which moved them to enter into the deed in question was that they might thereby acquire the valuable and extensive beds containing "large quantities of oysters of the best and most marketable and valuable

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quality" lying in the waters in question. The cross-bill further averred that prior to the granting of the lease in 1885 the said Otts had themselves planted oysters in various parts of the waters described, and that they were entitled to the right to gather oysters from these waters at the date of the lease, and that by cancellation of the lease by the stipulations of the deed these rights revested in appellees, and gave them the exclusive right to plant, cultivate, and gather oysters in the waters of the gulf in front of their property. Wherefore appellees (cross-complainants) prayed that the bill of complaint be dismissed, that an accounting be had of all oysters removed by complainant subsequent to date of cancellation of its lease, and that the Barataria Canning Company be perpetually enjoined from gathering oysters from said waters or otherwise interfering with appellees in conducting their business therein. A demurrer to their cross-bill having been overruled, appellees filed a motion to dissolve the injunction which had been granted upon the filing of the original bill of complaint. Testimony was taken upon that motion by which the state of facts hereinbefore set out was proven. In addition appellees were permitted to introduce parol testimony tending to prove that, while they had no conversation or agreement with an officer of appellant company, it was their understanding that the legal effect of said deed of October 14, 1903, was to vest in them the exclusive right to gather oysters northward and eastward of the line located by the deed, and that it was their intention, in executing the deed, and the moving consideration therefor, that the Barataria Canning Company was to surrender to them all its rights in the oysters planted and bedded in the waters described and lying in front of their property and northward and eastward of the line indicated. At the conclusion of the hearing the motion to dissolve the injunction was sustained, and an appeal granted the Barataria Canning Company, "in order to settle the principle of law in this case, and to avoid unnecessary expense and delay."

Several questions are presented by this record which must

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necessarily be considered in arriving at a proper decision of the controversy. Several others are urged upon us by the arguments and briefs of counsel, which are not involved directly herein, and which are therefore neither considered nor decided. Our consideration is limited to questions vital to the determination of the instant case.

The first inquiry arising is what rights the assignors of appellant acquired by their lease from the Otts in February, 1885. In addition to the lot of land demised by the contract, the lessee acquired "all the exclusive rights of said lessors to the water front on said sound or gulf of all lands owned by said lessors," and, further, "said water front herein demised in its extension into said gulf, with all its privileges and appurtenances of fishing and bedding oysters, to be extensive with the rights of said lessors under the law governing the same." It will be noted that this lease was executed on the 12th day of February, 1885, and the query naturally suggested is what right owners of land fronting on the Mississippi Sound had at this date in the land under the water beyond low water mark. The lessees in this case were granted the privilege of fishing and bedding oysters coextensive with the rights of said lessors, whatever those rights may have been, however great or small their extent. In the absence of express statute, the general rule that the owners of land bounded by the sea possess no exclusive right to the soil under the water beyond high water mark is so firmly established, so universally recognized, as to be almost axiomatic. 3 Kent's Com., sec. 427. At the date when this lease was executed the abutting landowner possessed simply the right which was enjoyed by the public generally of fishing in the waters in front of his property and of gathering oysters from natural beds, but this ownership carried with it no exclusive right to the water itself or to the fish and oysters therein. The waters were public domain, free to the common use of all citizens of the state. The abutting landowner was vested with certain rights of use and control over his water front. These rights consisted chiefly of the privilege of

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landing his boats, hauling his nets, the gathering of seaweed and shells, and taking sand from the beach between the high and low water marks; and in some jurisdictions these rights have been held to include the right to erect wharfs and piers and bath houses in the water in front of his property. These privileges he enjoyed by virtue of his ownership of land fronting on the seashore, but at the date of the lease here reviewed he owned as to the water itself, or the fish and oysters in the water, or the soil under the water, no right of use or enjoyment greater than that possessed by every other citizen of the state. So that the lessees by this contract acquired as to the water front simply the right of landing its boats, erecting its wharves, and conducting such other operations to which the seashore might conveniently be devoted, connected with and incidental to its canning business. These were all the rights of said lessors under the laws governing the same, for they had no private or exclusive "rights as to fishing or bedding oysters." The law regarding the planting and bedding of oysters which controlled in this state at the date of the lease in question is found in § 956, Code 1880, by which the boards of supervisors of the respective counties within the state were granted full power and jurisdiction for the protection and preservation of the oysters growing and being grown within the territorial limits of each county respectively, with the power to secure a private right of property in oysters banked, planted, or cultivated in the waters of the county. And in order to carry these powers into execution the board of supervisors were authorized to pass ordinances in reference thereto, and "such ordinances shall from the date of their adoption have the same force and effect as if enacted by the legislature of this state, and shall remain in force until repealed by said board." With full knowledge of this law, the lessees, having procured from their lessors a lot on which to erect a canning factory, having obtained the exclusive right to the use of the water front for the purposes incident to the operation of such canning business, next applied to the board of supervisors (the

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proper tribunal, vested by law with sole and exclusive jurisdiction over the subject-matter), and procured from it a grant for the period and term of twenty-five years of bedding, planting, and cultivating oysters within the waters—the water front to which they had acquired the right of use from the Otts. In our judgment, this was a proper exercise by the board of supervisors of an authority which had been expressly and constitutionally delegated to it by the legislature of the state, and such grant was not void as being *ultra vires* their powers. *Martin* v. *O'Brien,* 34 Miss., 36. This ordinance vested in the grantees "a right of property in the oysters so bedded, banked, and planted within such limits within said waters within the county of Harrison," and the ownership thus acquired became vested property rights, which no subsequent legislation could repeal or affect, and, in the instant case, none has been attempted by the legislature or board of supervisors.

This brings us, then, to the consideration of the relations and attitude occupied by the parties, respectively, prior to and at the date of the execution of the deed of October 14, 1903. They were as follows: The Otts, as lessors, were entitled to the annual rent for the demised premises, as stipulated in their indenture of lease. They had the right to use the beach and water front of their property in any manner which would not interfere with the business of their lessee carried on upon the leased premises. The Barataria Canning Company was entitled to the possession of the rented lot upon which its canning factory was located, to the use of the water front of the other portion of the property owned by its lessors which fronted on the gulf or sound. This much it acquired as lessee of the Otts. It was also vested with the absolute ownership, by virtue of the grant of the board of supervisors, of all the oysters which it had banked, planted, and cultivated in the waters described in the ordinance. This it acquired, not by reason of the lease from the Otts, for the Otts themselves possessed no such right of ownership at the date of their lease. The exclusive privilege of

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gathering oysters in the waters described, with a property right in the oysters planted therein, was granted to it by the ordinance of the board of supervisors; and having entered and acted with the approval and sanction of the lawful authority to which the exclusive jurisdiction had been delegated, the oysters planted by it became its sole property as against the world. With this understanding of the relative rights of the parties, passing to the consideration of the deed of October 14, 1903, we find the following provisions and stipulations: (1) The lease existing between the Otts and the Barataria Canning Company was to be cancelled and surrendered. The effect of this provision was to deprive the Barataria Canning Company of the privileges which it had acquired and enjoyed under the provisions of said lease, and these, so far as the water and water front are concerned, were simply, as hereinbefore pointed out, the right to use the beach and water front for purposes incidental to the operation of the canning factory. (2) The title to the lots on which the canning factory stood was converted from a leasehold estate to one in fee simple. Appellant thereby acquired an absolute title to the real estate, with such appurtenances as were conveyed by the express provisions or legal effect of the deed. (3) Any and all "littoral and aquatic rights and privileges appurtenant and attached to said land or vested in the grantors as owners of said land" were expressly reserved within certain limits, and it is further stated that the acceptance by the Barataria Canning Company of the deed was to be considered as an express abandonment by it of all "littoral and aquatic rights" which were reserved to the grantors. We find, then, that this was a deed in fee simple conveying certain lands, with a reservation of certain rights, to the grantors, and these rights are stated as being the "littoral and aquatic rights appurtenant to the land or vested in the owners by virtue of their ownership." It is a fundamental principle of construction of deeds that the reservation must be consistent with the grant of the fee, and also must be of some portion of the granted premises, which, without

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the reservation, would be conveyed by the deed. Whatever may have been the exact meaning which the scrivener intended to convey by the expression "littoral and aquatic rights," it appears manifest that these rights, as to a large portion of the water front described, were appurtenant to lands not conveyed nor intended to be conveyed by the deed. "Littoral and aquatic rights" are simply those rights which, in default of special statutory provisions to the contrary, pertain to lands abutting upon tide waters to which the common-law doctrine of riparian ownership does not apply. They have hereinbefore been sufficiently indicated. In the instant case the reservation in the deed as to other lands not conveyed by the terms of the deed simply retained, uselessly and unnecessarily, rights which by law are appurtenant to the land on account of its location as abutting on the seashore. So far, then, as this reservation is concerned, it was, in its legal effect, meaningless and inoperative. It is open to very serious doubt whether one having land to which, on account of its location, certain rights attach by operation of law, can convey the land itself, and yet retain the privilege which pertains by legal effect to the land. It is to be gravely questioned whether one owning land abutting on the tide water, or land situated on the streams to which the doctrine of riparian ownership applies, can in the one instance convey the land and reserve the littoral rights appurtenant thereto, or in the other convey the land and retain any claims to the soil under the water or the riparian right to accretions which, subsequently formed, would attach to the land itself as a legal incident. The view that such rights are adjuncts to the land, attaching thereto by operation of law on account of location, and not subject to separate, divisible ownership, is worthy of serious consideration. *Blakeslee Mfg. Co.* v. *Blakeslee Iron Works*, 59 Hun., 209 (13 N. Y. Supp., 493). However that may be, it is not necessary to the determination of this controversy for us to express a definite conclusion. The attempted reservation in the deed now under review can be given its full legal scope and ef-

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fect, and still in no wise affect the rights of appellant to the oysters which it had bedded and planted, and in which a right of property had been lawfully granted it. A reservation in a deed must not only be, as hereinbefore pointed out, of something which would otherwise, by operation of the terms of the deed, be conveyed, but it must necessarily be of something which belongs to the grantor at and before the execution of the deed. Property cannot be conveyed by reservation, and yet that is what is attempted to be done if the construction contended for by appellees be sustained. At the date of the deed appellees owned the land and the water front, with all littoral and aquatic rights lawfully appurtenant thereto. Appellant owned the oysters which it had planted and bedded in the waters in front of the land. By deeding a portion of the land and reserving certain rights which are merely incident to the land, appellees claim to have acquired title to the property of appellant. This view cannot be sustained. Appellant, being the owner of the oyster beds which it had planted, cannot be divested of its ownership by implication, and appellees can only acquire those rights by express grant. It is no argument upon either side to say what the intention of the parties was. The deed must speak for itself, and if the reservation be so indefinite as to convey no certain meaning, it will be held to be ineffectual. *Moore* v. *Lord,* 50 Miss., 229. "What one party to a contract understands or believes is not to govern its construction, unless such understanding or belief was induced by the conduct or declaration of the other party." *Bank* v. *Kennedy,* 84 U. S., 19 (21 L. ed., 555). In this case there was no misrepresentation on either side, as the parties dealt "at arm's length," and the deed was placed in escrow until accepted and delivered. It follows, therefore, that appellant is vested with the sole and exclusive ownership of all oyster beds which it has planted, and this ownership appellees should be required to respect. This does not deprive appellees of any "littoral or aquatic" rights which they may possess under the law, for such do not conflict with the

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rights of appellant, vested in it by the ordinance of the board of supervisors. We expressly decline now to decide as to the respective rights of the parties or the public after the expiration of the twenty-five years' grant which appellant acquired from the board of supervisors, and we do not intimate any view on this point.

Wherefore it follows that the action of the court in dissolving the injunction was erroneous, and the decree is reversed, and the injunction reinstated and made perpetual, and the cause remanded.

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FRANK THOMPSON v. STATE OF MISSISSIPPI.

1. CRIMINAL LAW. *Murder. Evidence. Previous difficulties.*

On the trial of a murder case testimony touching previous difficulties between defendant and deceased, and between defendant and his wife, a daughter of deceased, is inadmissible.

2. SAME. *Cross-examination of accused. Conversations.*

It is error to permit the defendant in a murder case, who testified in his own behalf, to be cross-examined touching statements made by him in a certain conversation after the court had properly excluded the testimony of other witnesses concerning the conversation.

FROM the circuit court of Monroe county.

HON. EUGENE O. SYKES, Judge.

Thompson, the appellant, was indicted for the murder of one James McGraw; he was tried and convicted of manslaughter and appealed to the supreme court.

On the 17th day of June, 1903, appellant was going south in the public road, not far from his home, and met deceased, McGraw, and his wife in a buggy, going north. The difficulty which resulted in the killing of McGraw occurred immediately upon the meeting of the parties. The only eyewitnesses were

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Brief for appellant.

Thompson himself and the wife of McGraw, who was in the buggy with him at the time of the homicide. Mrs. McGraw testified as follows: "We had started to Aberdeen. Along the way we met Frank Thompson in the middle of the road. In half a second after I saw him he caught hold of the horse's bridle, just so, and shot Mr. McGraw, and when he caught hold of the bridle he said, 'You are going to town this morning to settle this, are you? God damn your soul to hell!' and shot him twice and run." Defendant's version of the difficulty was that deceased, upon being saluted with the usual "Good morning, Mr. McGraw," began to draw out his pistol, which became tangled in the lap robe or some other furnishing of the buggy, when defendant drew his pistol and shot deceased. The evidence further showed that Thompson married a daughter of deceased in January, 1903, and at the time of the marriage McGraw and his family were living in the same house with the defendant, Thompson; that in a short time after the marriage disagreements began to occur, and McGraw and his family moved away; that Thompson's wife soon became dissatisfied, and abandoned her home and went to live with her father's family. A good deal of evidence was brought out on the trial in regard to the frequent troubles of the family, and the difficulty between Thompson and deceased. The state was permitted to show, over defendant's objection, that on the day before the homicide defendant passed the field where deceased was plowing, and had a wordy altercation with him, all the details of which were admitted in evidence.

George C. Paine, and *C. L. Tubb,* for appellant.

Admitting the testimony of the conduct and speech of appellant to the family of the McGraws months prior to the homicide, and the conduct of appellant at the home of the McGraws on the evening prior to the homicide, to go to the jury, evidently diverted the minds of the jury from the issue then submitted to them.

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Brief for appellee.

There is no verdict the jury could have rendered from the testimony of the eyewitnesses other than guilty of murder or not guilty. There was no element of manslaughter in the testimony of the eyewitnesses. In the case of *Raines* v. *State,* 81 Miss., 497, this court, speaking through Judge Terral, says: "It is a general rule of law that evidence must be confined to the point in issue, and that in criminal cases especially the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, and that it is only where the previous crime is connected with the one for which the defendant is on trial, and where it sheds light upon the motive of the accused, that it can be proved against him, unless it forms a chain of facts so intimately connected that the whole must be heard in order to interpret its several parts."

Certainly the conduct of the appellant at the house of the McGraws the evening prior to the homicide can shed no light on the motive of the appellant, because Mrs. Barnett says "the appellant told her the last thing that evening to say to" Mr. McGraw that he, appellant, was sorry and asked for pardon and sued for peace. He was evidently through with the horrible matter, it was buried so far as he was concerned, and he then left the vicinity of the McGraw home and went home. In so far as shedding light on the conduct of the appellant on the morning of the homicide, the occurrences of that evening, and explaining the motives of the appellant, they do not do so, but, on the contrary, evidence the fact that these difficulties were entirely separate and distinct from the difficulty that terminated in the death of McGraw. This testimony was so harmful and illegal to the side of the appellant as to cause the jury to overlook the real issue in the case.

J. N. Flowers, assistant attorney-general, for appellee.

It may as well be admitted here that the trial court permitted a vast deal of incompetent testimony to go to the jury. The details of a previous difficulty were shown; the falling out be-

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Opinion of the court.

tween the accused and his wife and her family; the reasons for the falling out; the conduct of Mrs. McGraw in making two or three trips to Thompson's home to bring her daughter away and carry her back. The deceased was the father-in-law of the accused.

But this is a rare case in which, it will strike the court, the errors worked to the advantage of the man on trial. The jury took the side of the accused and were convinced that he had been wronged and harassed without just cause. We think that if the jury had been confined to the competent testimony and had heard no other they would very likely have rendered a verdict for murder. At every departure some facts were developed to show that the defendant had been troubled, oppressed, and driven to extreme measures. For an instance, proof of the fact of a previous difficulty would have tended to show malice, but this conclusion is met, or at least the effect of it is mollified, by the incompetent testimony as to the details of that difficulty which show that the defendant was not altogether to blame.

Another general reflection is here ventured that the incompetent testimony compained of, as shown by this record, all of which it is insisted worked to the advantage of the accused, was brought out by counsel for defendant or was rendered admissible by something which had been brought out by them. In fact, the doors were opened by counsel for defendant, and after the rules of evidence were once ignored they seem to have been suspended for the purposes of that trial thenceforth.

WHITFIELD, C. J., delivered the opinion of the court.

The court ought not to have permitted the details of the previous difficulty to be shown in evidence, nor the falling out between the accused and his wife and her family, nor the reason of that falling out, nor the conduct of Mrs. McGraw in making two or three trips to Thompson's home to bring her daughter away. All this testimony should have been excluded as foreign to the issue which the jury was trying. It is true that in the

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cross-examination of Mrs. McGraw some of this testimony was drawn out by the counsel for defendant, particularly with respect to the three separations between the husband and wife, and with reference to Mr. McGraw's reasons for leaving Frank Thompson's place; and it is further true that the state objected and the court overruled the objection. But there is very much more of the testimony, along all these lines, introduced by the state over the objection of the defendant, and erroneously admitted. We specify particularly here the testimony of Mrs. Barnett, who was permitted to detail at great length the conduct of defendant in riding up and down in front of McGraw's house, the day before the killing, with a shotgun, daring him out, cursing, and disturbing the entire family; and the testimony of Fannie May McGraw to the same effect. The necessarily evil effect of admitting this testimony introducing a number of irrelevant issues is plainly seen in the examination and cross-examination of the defendant, which was very lengthy. Counsel for defendant went into all these matters, deeming it essential, since the testimony had been admitted, that defendant should make the best explanation that he could; and the counsel for the state naturally crossed on all these irrelevant issues. One illustration will suffice: The court had, earlier in the trial, excluded the testimony of Bob Dickerson on the objection of the defense, and yet the defendant was allowed to be asked on cross-examination this question: "Didn't you say to Bob Dickerson, Sally Dickerson, and Nels Paine, on the morning of the killing, that if you met him (meaning McGraw) you or him one would eat breakfast in hell?" It is true that defendant denied making the statement, and his denial was not contradicted, but no such question should have been asked in view of the fact that the court had correctly excluded the testimony of Dickerson early in the trial, which testimony of Dickerson was about the very conversation when Nels Paine and Sally Dickerson were present the morning of the killing. If the testimony of Dickerson was incompetent about this very conversation, upon what theory

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Statement of the case.

should the district attorney be permitted to ask the defendant about an incompetent conversation already excluded? We only add this observation, that the testimony of Mrs. McGraw and of the defendant are in direct conflict as to what occurred at the time of the killing, and in view of this fact it is not possible for us to say that these errors are not reversible errors.

Reversed and remanded.

WHEELER WATSON v. BURWELL A. DUNCAN
AND
WHEELER WATSON ET AL. v. BURWELL A. DUNCAN.

(Two Cases.)

1. ESTATE OF DECEDENT. *Witnesses. Competency. Code* 1892, § 1740 *Husband and wife. Ante-nuptial contract.*

Where a married woman died leaving a will and the surviving husband sought under the statute, Code 1892, § 4496, to renounce the will and take a share of her estate, in opposition to which was pleaded an ante-nuptial contract empowering the wife to dispose of her property by will as she should see proper, the husband was incompetent as a witness to impeach the contract as a forgery, under Code 1892, § 1740, providing that a person shall not testify to establish his own claim against the estate of a decedent.

2. SAME. *Forgery.*

Facts of the case examined and adjudged insufficient to show that an ante-nuptial contract was a forgery.

FROM the chancery court of Lowndes county.

HON. JAMES F. MCCOOL, Chancellor.

Duncan, the appellee, was complainant in both cases in the court below; Wheeler Watson, appellant, was sole defendant there in one of the cases, and he and Henry Watson were defendants in the other case. From decree in complainant's favor, defendants appealed to the supreme court.

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Brief for appellant.

In January, 1894, appellee, Duncan, married Mrs. J. W. Manning. Before the marriage they entered into an ante-nuptial contract, which is set out in full in the opinion of the court. Mrs. Duncan, formerly Mrs. Manning, died in August, 1902, testate, leaving nearly all of her property, a large estate, to her two brothers, Wheeler Watson and Henry Watson. Part of the lands were devised to Wheeler Watson solely, and the other to him and Henry Watson jointly. Duncan renounced the will, and elected to take his share of the estate under the law. He filed two bills in the chancery court of Lowndes county, one against Wheeler Watson, the other against Wheeler Watson and Henry Watson, praying for the sale of part of the real estate for partition and for a partition in kind of the remainder. By agreement both cases were tried together on the same evidence. The defense set up to both bills was the ante-nuptial contract, the clause of which empowering Mrs. Manning to dispose of her property by will as she might desire being assailed by complainant as a forgery.

Geo. C. Paine, for appellant.

To avoid a contract because it has been altered, the alteration must be material. *Bridges* v. *Winters,* 42 Miss., 143. A material alteration is a change which causes the instrument to speak a different language in legal effect from which it originally spoke. 2 Cyc., 177 to 180, D. Any change in form and word merely, even if made by an interested party, which leaves the legal effect and identity of the instrument unimpaired and unaltered will not destroy the instrument. 2 Cyc., 190, E; *Bridges* v. *Winters,* 42 Miss., 139; *Gordon* v. *Sizer,* 39 Miss., 805.

The case at bar, tested by the law as announced, and even admitting the full force and effect of the testimony of Mrs. Eicholtz, will not entitle appellee to the relief prayed for, and the cause should be reversed and remanded.

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Brief for appellant.

But the appellee says this contract was a mere joke, a piece of pleasantry, and Mrs. Eicholtz and Mrs. Maronne agree with him. To these young people it may have been a joke; the action of this old man, the appellee, and Mrs. Duncan was calculated to impress them as being ludicrous. But to appellee and his wife it was real; it was earnest and solemn.

The testimony of Duncan, the appellee, is incompetent, and the exceptions to it should have been sustained by the chancellor.

William Baldwin, on the same side.

"An ante-nuptial marriage contract must ordinarily be in writing in order to satisfy the statute of frauds, but it need not be expressed in technical language or be in any particular form. It is sufficient if it set forth a definite, final agreement or promise in relation to the rights involved." 19 Am. & Eng. Ency. Law, 1234, 1235.

"Ante-nuptial contracts are to be liberally construed to carry into effect the intention of the parties, without regard to the strictly technical meaning of the words used. For this purpose the whole instrument should be considered, and evidence also of the situation of the parties, the surrounding circumstances, and all other matters that will throw light on the intention of the parties will be received." 19 Am. & Eng. Ency. Law, 1240.

Turning now to the contract before us, and considering the whole facts and surroundings of the parties, we have a widow lady in middle life, of feeble health, fairly well off in property, about to be married to a widower with grandchildren and no property. We find further that this woman about to be married to this man is deeply devoted to her brothers, with whom her whole life has been spent, and under contract with one of her brothers, for a consideration already received, to devise him, at her death, her most valuable property.

Now, this woman so circumstanced exacts a marriage con-

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Brief for appellee.

tract as the condition of the marriage, and that contract is agreed to and signed and sworn to upon the Holy Bible.

That contract is written by another woman who, to use her own language, had never heard of a marriage contract before, but she in her way wrote it at the dictation of the woman about to be married. And that contract so agreed to, and so written, reads: That the woman is to have absolute control of her property and its management; that the man is not to ask her about her will, that she is to will her property to any person she wants to. How it is possible to find in this contract, so written and so framed, anything vague or indefinite as to the intention of the parties, can only be discovered by those who deal in subtleties that are not permitted unto any save the elect.

The testimony of Duncan, appellee, is wholly inadmissible, as he is testifying in his own behalf against the estate of a deceased person. And he is, moreover, testifying in his own behalf as to acts and declarations of a deceased person, and an alleged alteration of a contract made by such deceased person with himself.

If there was ever a case where both the letter and the spirit of the statute forbid his testifying, this is the case. Indeed, a stronger case for the exclusion of his testimony cannot be stated. 2 Cyc., sec. 7, p. 250; sec. 1740 of Annotated Code of Mississippi, 1892; *Jacks* v. *Bridewell,* 51 Miss., 881; *Green* v. *Mizelle,* 54 Miss., 220; *Rothschild* v. *Hatch,* 54 Miss., 554; *Jackson* v. *Smith,* 68 Miss., 53; *Duncan* v. *Gerdine,* 59 Miss., 550.

Betts & Sturdevant, for appellee.

We do not deny that a husband can, by a proper instrument, relinquish his marital rights in his wife's property, but we claim that this instrument relinquishes nothing, and that it gives Mrs. Duncan no power as to making a will and disposing of her property that she did not already have under § 4488, Code 1892, even if the court should consider the writing genuine, and that

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Brief for appellee.

there is no more inconsistency between the marriage contract and the renunciation of the will by Duncan than there is between sec. 4488, which gives a married woman the right to devise her property as she wishes, and sec. 4496 of the same code, which gives the right to the husband, when unsatisfactory provisions are made, to renounce the will.

Duncan is a competent witness in this case. He is not testifying to establish his "own claim or defense against the estate of a deceased person which arose in the lifetime of such deceased person." *Covington* v. *Frank,* 77 Miss., 606.

If it should be urged by the defendant that Duncan is testifying about an agreement made with Mrs. Duncan in her lifetime, that death having sealed her lips, the law will seal his, we would reply that he has a perfect right to testify as to anything, when the purpose of his testimony is to esetablish a claim that arose after the death or at the death of the deceased, and further that he is not testifying about an agreement made between himself and his wife, but denying that there was any such agreement.

The issue of fact, that the only sentence in the alleged antenuptial contract that is claimed to exclude Duncan from the exercise of his positive statutory right to renounce the unsatisfactory provision made for him in the will, was not in the contract as signed by him, is submitted to the court on the testimony read on the hearing; calling attention to sec. 564 of Greenleaf on Evidence (15th ed.), which puts burden on party offering (the defendants here) the instrument in evidence to explain its suspicious appearance.

The contract set up in each answer is new matter, and the burden of proving such a defense always rests upon those asserting it.

It is not denied by complainant that the signature, Burwell Alexander Duncan, is his writing, but the entire issue of fact in these cases is as to whether the writing, as it was when filed

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Brief for appellee.

in these cases, and as it now exists, is the same writing signed by Duncan on the eve of his marriage.

In the first place, the very appearance of the paper itself casts discredit on it. It may be said to come in such "questionable" shape as to require those producing it to explain its appearance before its admission in evidence. 1 Greenleaf on Evidence (15th ed.), 564.

S. A. Witherspoon, on same side.

There are only two questions involved in the case, and they both arise not from any denial of the case as stated in the bill, but from two separate and distinct affirmative defenses set up in the answer, one of which goes to the entire estate described in the bill, and the other is limited to the lands in Coahoma and Tallahatchie counties.

The first question presented is whether or not the appellee's renunciation of the will of Mrs. Duncan is rendered void, because he had entered into an ante-nuptial contract which estops him from renouncing the provisions of her will.

The first reason why this so-called contract is not a surrender of appellee's right to renounce the will is because the writing contains no such provision. There is nothing in the writing by which the appellee professes to surrender those property rights which the statute gives him as the husband of the deceased, nor does he agree anywhere in this writing to surrender any of his rights, nor does he anywhere agree not to renounce any provisions of her will which might not be satisfactory to him. There is not only nothing of this kind expressed in the so-called contract, but the whole argument of the appellants is based on the contention that the appellee's surrender and release of his marital rights and his agreement not to renounce the provisions of his wife's will is an implication and inference from one sentence of this so-called contract. That sentence is in these words: "You can will your property as you want to any persons." And it is contended that because the appellee

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Brief for appellee.

had thus agreed that his wife might will her property to such persons as she might choose, therefore he had agreed by implication that she should have the right to disinherit him. This contention is illogical and unfounded.

In the case of *Williams* v. *Claiborne,* 7 Smed. & M., 495, this court laid down the rule with reference to the construction of ante-nuptial contracts in these words: "We concur fully with the counsel for complainant that the marital rights of the husband cannot be defeated unless an intention be clearly expressed that the property is to be held for the separate use of the wife. Nothing is to be implied against him. This is the rule laid down by the authorities, and is one which we have heretofore recognized."

In the case of *Carroll* v. *Renich,* 7 Smed. & M., 806, the court says that by marriage agreement the marital rights are excluded only to the extent that a valid legal instrument operates to do so. Now, if the rule as laid down in the above cited authorities be the rule—if, in other words, it is only by express stipulations that the marital rights of the husband can be surrendered, and if nothing is to be implied against him—then the so-called ante-nuptial contract, in which nothing is said about the marital rights of the appellee, and in which we find no stipulation that he could not claim his statutory rights in the estate of his wife, and in which we find no agreement to surrender his right to renounce the unsatisfactory provisions of her will—the so-called contract does not amount to a defense.

The second reason why this so-called ante-nuptial contract does not surrender the appellee's right to renounce the will is that said contract is without consideration, and therefore has no legal effect. I do not deny at all that marriage is a good consideration for any contract or conveyance, but the facts of this case show that the pretended contract was not made in consideration of marriage. There is nothing on the face of the contract in regard to the subject of marriage. It does not state that the agreements contained in the paper were made in considera-

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Brief for appellee.

tion of the agreement of Mrs. Duncan to marry the appellee; and if marriage was the consideration, that fact must be proven, not by the terms of the contract itself, but by outside testimony.

All the testimony in the case shows that the appellee and Mrs. Manning had bound themselves by contract to their intermarriage long before this so-called ante-nuptial contract was suggested.

The so-called ante-nuptial contract was evidently a mere joke, and was so understood by all the parties present, not only Duncan, but both of the subscribing witnesses.

The fourth reason why the pretended contract is not a relinquishment of the appellee's statutory rights in the estate is that said pretended contract is contrary to public policy, and therefore void. It contains a number of stipulations which no court would attempt to enforce, and for the breach of which no court would award damages. If the contract be a valid one, then all of its terms are enforceable in the courts of the country, and it is manifest that a suit upon these terms of the contract would expose to public investigation those private matters of domestic life which it is the policy of the law to conceal from the gaze of the world.

In the case of *Miller* v. *Miller,* 16 Am. St. Rep., 431, the court considers the validity of a contract by which the husband had agreed among other things to pay to his wife a certain sum of money annually, and by which both parties agreed to refrain from scolding, fault-finding, and anger. The wife brought suit upon this contract to recover the amount promised, but the court held that she had no right of action, because in order to recover it was necessary for her to allege and prove that she had always refrained from scolding, fault-finding, and anger, and that this would raise an issue to be determined by the court, which would necessitate an investigation into matters of domestic life which would be fraught with irreparable mischief, and which were forbidden by sound considerations of public policy. This decision is based upon the ground that according to the genius

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of our laws and civilization matters pertaining to the home and its value as such, and which should be controlled by the influences surrounding it, should not become matters of public concern or inquiry.

CALHOON, J., delivered the opinion of the court.

Both these cases were submitted together, and will be decided together. Duncan was not satisfied with the provision made for him by the will of his wife, renounced, and claims one-half her estate, there being no issue of the marriage. He, while a widower of fifty-nine years of age, and she, while a widow of fifty, intermarried under a marriage contract. He admits signing the contract, but seeks to avoid it on the ground that she, after its execution, forged a vital part of it. At the time of the marriage he was without property, and she was, for this section, comparatively rich, and, from her standpoint, the ante-nuptial contract was, as we think, wise and proper in her surroundings; so the case must turn on whether the part of the contract italicized in the following copy of it was or was not a forgery:

"This is a contract entered into between Mrs. J. W. Manning and Dr. B. A. Duncan, this the 30th day of January, 1894.

"I will always let you do just as you wish about everything in this life. You will never keep house unless you wish and of your own accord. I will always let you attend to your own business, and will never ask you about your will. *You can will your property as you want to any persons.* I will love you above all else as long as life shall last. All this I will swear to.

"[Signed] BURWELL ALEXANDER DUNCAN.

"Witnessed this day by Mrs. Eicholtz and Mrs. J. E. Maronne."

On the next page are written, concededly by Mrs. Manning, these words:

"As Dr. B. A. Duncan has promised and sworn on the Holy Bible to keep this contract written on the other side of this

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sheet in every particular, I promise to marry him this evening, January 30, 1894.

"[Signed] J. W. MANNING."

The paper signed by Duncan was written by Mrs. Eicholtz at the dictation of Mrs. Manning, there being present Duncan, Mrs. Manning, Mrs. Maronne, and Mrs. Eicholtz when it was written and signed. There is no controversy as to the integrity of the document except as to the words, "You can will your property as you want to any persons."

Duncan was the first witness examined, and, waiving for the present his competency against the estate, he testifies absolutely that these words are forged, and, to make sure of fixing the forgery on his wife, he testifies that they are in her handwriting. Since the words appear consecutively in the instrument without paragraph, the proof of the forgery must be plain to destroy the paper as to them, especially as they are germane to the immediately preceding words: "I will never ask you about your will." Duncan is not a competent witness in this case, and all his testimony about what was done in his wife's lifetime must be retired from view.

We will examine the testimony of Mrs. Eicholtz, who wrote the instrument. Now, bearing in mind the only words objected to—viz., "You can will your property as you want to any persons"—Mrs. Eicholtz testifies that she did write something where those words are, but cannot remember what; but she says: "The words 'want to' and 'persons' I did not write, and I am not sure about the word 'property.'" With these three words left out, the sentence just following—bear in mind, the sentence, "I will never ask you about your will"—would read: "You can will your ——— as you ——— ——— any persons." The imagination can hardly fill these blanks with any intelligent words other than those she says she did not write. When asked what she did write there, she says: "I do not remember what it was, but I feel as if I thought, if there had been anything about willing property, I would have remembered it, as I remembered the

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other part of the contract." Note that "will" had appeared in the preceding sentence, which she did write, and note that other witnesses think the handwriting the same, and note that it was on very common paper, and note that eight years had elapsed, and it is much easier to conclude that the good lady was mistaken than to stamp as a deliberate forger the deceased, Mrs. Duncan, a lady of high character and intelligence, who manifestly had her mind on her will when the contract was drawn. It must also not be forgotten that Mrs. Duncan had carried this paper about with her for years.

Mrs. Maronne, the other lady present, says nothing was said "about willing property," but she says she looked on the whole thing "just as a joke," paid no attention, and did not put down her work to sign it as a witness, but got Mrs. Eicholtz to sign her name for her. These two witnesses hardly fix forgery on Mrs. Duncan in the light of all the evidence in the case.

We come now to the testimony of experts. Dr. Stockard, for Duncan, testifies that, in his opinion, the words "You can," the words "want to," and the word "persons" are not in the same handwriting with the rest of the paper. So, now, according to him, the reading in the same hand is: "——— ——— will your property as you ——— ——— any ———." But, as we have seen, according to Mrs. Eicholtz, the draftsman, it would read: "You can will your ——— as you ——— ——— any persons." Dr. Stockard thinks the words filling the blanks resemble the handwriting on the reverse side of the paper, written, as all concede, by Mrs. Duncan, but he says: "I can't be positive about the identity of the handwriting on the two sides of the paper."

Col. W. C. Richards, summoned as an expert by Duncan, thinks the words "want to" were not written by the person who wrote the contract, and is "inclined to believe" the words "you can" were not. So at most, according to his opinion, the sentence would read: "—— —— will your property as you —— ——— any persons." According to Mrs. Eicholtz: "You can

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Opinion of the court.

will your ——— as you ——— ——— any persons." According to Stockard: "——— ——— will your property as you ——— ——— any ———." Col. Richards also thinks the word "to" after "want" is in the handwriting of the reverse page written by Mrs. Duncan.

Mr. T. B. Franklin thinks there is a "reasonable doubt" about the words "you can" and "want to" being written by the same hand. He says all the balance is in the same handwriting. Further on he is decided in the opinion that the words "you want to" are in an entirely different handwriting. So, according to him, the reading is: "——— ——— will your property as ——— ——— ——— any persons." According to Mrs. Eicholtz: "You can will your ——— as you ——— ——— any persons." According to Stockard: "——— ——— will your property as you ——— ——— any ———." According to Col. Richards: "——— ——— will your property as you ——— ——— any persons."

Mr. H. Osborn says the words "you" and "can" and "property" and "want" and "to" and "persons" are different in handwriting from the body of the contract. So, according to him, the reading is: "——— ——— will your ——— as you ——— ——— any ———."

Mr. P. W. Maer, for appellee, discards "you can" and "property" and "want to" and "persons," and so, according to him, the genuine sentence is: "——— ——— will your ——— as you——— ——— any ———."

R. F. Williams, for appellants, testifies that, in his opinion, the whole of the contract is in the same handwriting, and no forgery about it.

C. H. Ayres, for appellants, testifies that in his opinion "the person who wrote the body of the document wrote the entire thing, with the exception of the signature."

Now, the original paper is before us. We have examined it with great care and with a powerful magnifying glass. In the only controverted sentence, which is, "You can will your prop-

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erty as you want to any persons," we see that the word "property" seems to be written above a thin place in the paper, or an erasure, and so of the last syllable "sons" of the word "persons," and so of the word "want;" and the word "to," just after it, is very close between "want" and "any." Now, at the risk of being tedious in this important case, involving the good name of a dead woman of flawless reputation, we put in juxtaposition what each and every witness says in reference to the only disputed clause, which is: "You can will your property as you want to any persons." Duncan says the whole sentence is a forgery. He is contradicted by every other witness. Mrs. Eicholtz would leave the genuine sentence thus: "You can will your ——— as you ——— ——— any persons." Mrs. Maronne remembers no talk about willing property. Dr. Stockard would leave the sentence thus: "——— ——— will your property as you ——— ——— any ———." Col. Richards thus: "——— ——— will your property as you ——— ——— any persons." Mr. Franklin thus: "——— ——— will your property as ——— ——— ——— any persons." Mr. Osborn thus: "——— ——— will your ——— as you ——— ——— any ———." Mr. Maer thus: "——— ——— will your ——— as you ——— —— any ———." Mr. Williams thinks the whole in the same handwriting with the rest of the contract. Mr. Ayres thinks the same person wrote "the entire thing." All the experts called on both sides had about equal opportunities to become experts. Col. Richards, for appellee, says there are marks of erasure at the words "property" and "persons." H. Osborn, for appellee, says there "appears to have been an erasure under the words 'you' and 'property' and 'want' and 'persons' in the last syllable of it," and that he "noticed a distinct thinness of the paper at those points, and a thinness in another point of the paper," not controverted. P. W. Maer, for appellee, says "it looks as if" there were erasures at "can" and "property" and "sons" in the word "persons," and ascertains this by holding the paper to the light, when "it appears thinner and

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Syllabus.

more transparent." R. F. Williams, for appellants, says he sees thinner and more transparent places at "want" and "sons" in "persons," but cannot say whether the appearance under the word "property" is thinness or erasure. C. H. Ayres, bank teller, witness for appellants, says: "Under the word 'property' it seems to be a natural thinness of the paper. In the word 'want,' where the letter 'a' occurs appears to have been erased." In all the conflict of testimony and contrariety of expert opinion in this case, and the uncertainty, from the lapse of time, poor quality of paper, and its usage, whether the changes were made before or after its execution, and the nonsense of the sentence without the words objected to, we recoil from fixing the brand of forgery on the memory of Mrs. Duncan.

The other contentions of appellee we regard as without merit.

Reversed, and decree here in both cases dismissing the bills in both cases; costs of both to be taxed appellee.

BEE W. HOLLOWAY v. RUFUS S. MILLER.

1. PUBLIC LANDS. *Conveyance. Possession. Improvements.*
   A person, not a willful trespasser, who has the possession of public lands, and has placed improvements thereon, has an interest therein which he may convey to his vendee.

2. SAME. *Warranty. Breach. Eviction.*
   One who purchases from another lands, the title to which is found to be in the United States government, may sue at once, without awaiting eviction, upon the covenants in his deed.

3. SAME. *Grantee perfecting title. Measure of damages.*
   If a vendee of land upon finding the title to be in the United States government retain possession of the premises and the improvements thereon and, without notice to his grantor, perfect title in himself, his measure of damages in a suit upon the covenants in his deed is the sums paid in perfecting his title and other damages, if any, caused by the breach of the warranty, not including the purchase price paid his grantor.

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Brief for appellant.

FROM the circuit court of, first district, Marion county.

HON. WILLIAM T. MCDONALD, Judge.

Miller, the appellee, was plaintiff, and Holloway, the appellant, was defendant in the court below. From a judgment in plaintiff's favor the defendant appealed to the supreme court. The opinion fully states the case.

Mounger & Mounger, for appellant.

Counsel for appellee rely on *Pevey* v. *Jones*, 71 Miss., 647. This is a case unsupported by a single authority, and, while correct in the result reached, is ill advised in seeming to be authority for what it is not. It is not authority for the position of the lower court in this case. There it is said: "The grantee acquired nothing as to the land owned by the United States." There the grantee was never in actual possession, there were no improvements; but in this case Miller did get something, and Holloway did part with something. Holloway gave up and Miller received actual possession. This put Miller in a position to learn that the land was public and removed Holloway from such position. It put Miller where he had a preference before all others to enter said land, and it removed Holloway from the position where he would have such preference. In the case of *Pevey* v. *Jones* the vendee lost the land and was never in possession and could never perfect the title. A payment back of the entire purchase money with interest was necessary to make him whole. Nothing less would have made him whole. In this case Miller saved the title, and did so by reason of being in possession, and did so at little expense. He can be made whole for less than the purchase money. These additional facts give place for a principle of equity to operate. There was no place for it to operate in the case of *Pevey* v. *Jones*, but here there is a place for it. The principle is that the vendee is held to entire good faith with his vendor, and should not be allowed to speculate or make personal gain. This is discussed in *Kirkpatrick* v. *Miller*, 50 Miss., 527.

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Opinion of the court.

T. S. Dale, for appellee.

This is a case in which appellant sold appellee eighty acres of land belonging to the United States government. Appellant, while in possession of the land, was a trespasser, and of course he could give appellee no other possession than such that he had himself. Appellee paid appellant not for eighty acres of land and not even for possession thereof, but paid him for absolutely nothing, the amount as shown by the evidence and for which a judgment was given him in the lower court; hence appellant is liable unto appellee for money had and received. *Pevey* v. *Jones,* 71 Miss., 647.

It is contended by counsel for appellant that this case is not supported by that of *Pevey* v. *Jones,* but I am unable to see the difference; both appellant and appellee in this case being trespassers, neither one could be in such possession under the law as to have any vested rights whatever. In the above cited case the court in its opinion says: "In this case the grantee acquired nothing whatever as to the land owned by the United States; and by virtue of the transaction his vendor, on receipt of the purchase money, thereby at once became liable to him for money received to his use."

TRULY, J., delivered the opinion of the court.

Appellant, for a long term of years, had been, by virtue of several conveyances, in possession of a tract of land including the eighty acres about which this controversy arose. He had cultivated, fenced, erected buildings, and generally improved the same, claiming, operating, and cultivating the same as owner. Under these circumstances he executed a deed to appellee conveying with full warranty of title a tract of one hundred and fifty acres, of which this eighty formed a part. Under this deed appellee entered into possession, used and controlled the same for several years, when he discovered that the title to the eighty acres had never been divested from the United States government, whereupon, without advising his vendor, he made

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Opinion of the court.

an entry of the said land as a homesteader, secured his certificate of entry and duplicate receipt, and then made a demand on appellant for the purchase price of eighty acres, and, this being refused, filed suit in the circuit court for the proportionate amount of the purchase price of the entire tract which was represented by the eighty acres. Appellant offered to pay the amount expended by appellee in procuring his homestead entry and such other sums as would necessarily be expended by him in perfecting title to the land. At the conclusion of the testimony which developed the above state of facts the court peremptorily instructed on behalf of appellee that the jury should find for him "in that amount which they believe from the evidence the eighty acres was worth in the total valuation of the one hundred and fifty acres as fixed by the parties at the time of the trade and paid by the plaintiff, and six per cent interest thereon from date of payment," and refused an instruction for appellant that appellee was "only entitled to recover whatever amount the evidence shows Miller has expended and will necessarily have to expend to perfect his title" to the land in controversy. It was shown by the testimony that the eighty acres in question contained improvements erected by appellant and still thereon at the date when appellee entered into possession, the value of which was variously estimated at from $100 to $200, and there was conflict in the testimony as to what was the relative value of the eighty acres and the remaining portion of the tract conveyed.

The action of the court in instructing the jury to find in appellee's favor for the entire amount paid for the eighty acres was probably based upon the opinion of this court in *Pevey* v. *Jones,* 71 Miss., 647 (16 South., 252; 42 Am. St. Rep., 486). That case can be readily differentiated from the one here presented. There it was held that the grantee in a deed by which it was attempted to convey land of the government, but to whom possession was not actually delivered, was not required to take possession of the public land, or attempt to enter upon it, but that

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a right of action immediately accrued to recover for a breach of the warranty; and this was not dependent on any future event, but was fixed by the sole fact of the ownership of the land by the government. In that case the grantee acquired nothing whatever as to the land owned by the United States, and for that reason it was held that his right of action for the recovery of the purchase money paid accrued at once upon the execution of the deed. In the instant case appellee did acquire substantial rights by the conveyance from appellant. He acquired the use and ownership of the improvements on the land. More than this, he obtained that possession which was indispensable to his entry of the land from the government as a homestead. These were valuable rights vested in appellant, and which he could legally transfer and convey to his vendee. *Hooker* v. *McIntosh,* 76 Miss., 693 (25 South., 866). Under this state of facts appellee is not permitted to now claim from his vendor the total amount of money which he had paid as the purchase price of the land without first surrendering possession of the land and improvements which he obtained by means of such conveyance. One cannot enter into possession by virtue of a conveyance, and, taking advantage of some secret defect in the title, procure the outstanding paramount title to the detriment of his vendor, and then sue for the purchase money of land and improvements, from which he had not been evicted and the possession of which he still retained. The rule in reference to breach of warranty is that the warrantor must make whole his vendee for all damages inflicted and for all moneys necessarily expended for the protection of the possession. And the duty of the vendee of the land the title to which fails is stated in *Dyer* v. *Britton,* 53 Miss., 278: "The doctrine is that he must deal fairly and in fidelity to his warrantor; that, while he will not be permitted to break allegiance to the title under which he entered and holds possession, yet he shall not be put to the useless expense of a fruitless litigation against an incumbrance or paramount title, which must ultimately prevail, but may, if necessary to pre-

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Opinion of the court.

serve the estate and the possession, pay off the one and buy in the other; and for such outlays of money he shall be reimbursed." One who finds that he has unwittingly attempted to purchase a tract of land the title to which is in the United States government need not wait an eviction, which must inevitably come, but may immediately abandon possession thereof, and institute suit for the recovery of the purchase money paid. But he cannot retain the possession of the land and improvements, and, without notice to his vendor, by virtue of whose conveyance that possession was obtained, vest in himself a paramount title which such possession alone enabled him to acquire, and then recover aught but the money which he has been forced to expend for the protection of his possession and the perfecting of his title, and such other damages as may have been caused by the breach of warranty. *Frink* v. *Hoke,* 35 Or., 17 (56 Pac., 1093). Full compensation for the breach is the extent of the recovery authorized. This is the universal rule, which is not varied by the fact that the land to which the title failed belonged to the United States government. *Galloway* v. *Finley et al.,* 12 Pet., 262 (9 L. ed. [U. S.], 1079). Appellee is estopped by his conduct from claiming the entire purchase price. The amount of his damage is the sum of his rights. To allow him to recover more would be to work a fraud under the guise of law, and this cannot be countenanced.

Reversed and remanded.

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CASE HEARD AND DECIDED BY THE JUDGES

— OF THE —

SUPREME COURT OF MISSISSIPPI,

IN VACATION,

1904.

EX PARTE HENRY C. WALL.

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1. HABEAS CORPUS. *Bail. Pendency of appeal. Murder. Extradition. Code* 1892, § 2227.

Under Code 1892, § 2227, denying the benefits of the writ of *habeas corpus* to one charged with an offense committed in any other part of the United States, and who, agreeably to the constitution of the United States or the laws of the state, ought to be delivered up to the executive power of the state or territory where the offense is charged to have been committed, a person indicted for murder in another state—an offense not there bailable—and who has been arrested in this state on a warrant issued by the governor upon requisition from the chief executive of such other state, is not entitled to bail pending his appeal to the supreme court from a judgment remanding him to custody in a *habeas corpus* proceeding based upon the ground that he is not a fugitive from justice and was not in such other state when the crime was committed.

2. SAME.

Distinction pointed out between cases of arrest and examination for commitment to await extradition demand and warrant, on the one hand, and cases arising on *habeas corpus* after arrest on executive warrant for extradition, on the other.

Hearing before the judges of the supreme court in vacation, August 22, 1904.

The opinion states the case.

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Opinion of the court.

R. N. Miller, and *J. H. Price,* for petitioner.

William Williams, attorney-general, *Edgar H. Ratcliff,* and *R. W. Cutrer,* opposing.

CALHOON, J., delivered the opinion of all the judges.

Wall was indicted in Louisiana for murder, which is not bailable in that state, and the governor of Mississippi, on requisition, issued his warrant of arrest and delivery to the agent of Louisiana. On his arrest, pursuant to this warrant, Wall sued out a writ of *habeas corpus,* and was tried before the chancellor, who heard evidence and refused to discharge him. He appealed from this decision to the supreme court, where the cause is pending for determination at its ensuing term.*

He now presents his petition to the judges of this court in vacation for an order allowing him bail pending the appeal, and bases his right to it on the record. His point is, as it was before the chancellor, that he is not a fugitive from justice, because he says he was not in the state of Louisiana, but in the state of Mississippi, when the crime is alleged to have been committed, and he affirms that the overwhelming weight of the evidence shows this.

The judges of the supreme court cannot review the action of the chancellor in holding the prisoner. No power can do that except the appellate tribunal in session as a court.

In examining the underlying question whether one held on *habeas corpus* trial, pursuant to executive warrant for extradition, is bailable at all, confusion will arise without careful notice of the statutes on which the various decisions rest. There is an obvious distinction between cases of arrest and examination for commitment to *await* extradition demand and warrant, and cases arising on *habeas corpus after* arrest on executive warrant for extradition.

This distinction is pointed out in 2 Moore on Extr., sec. 601, and the author says: "A person arrested on a rendition war-

*This appeal was afterwards dismissed. Wall was tried in Louisiana and acquitted.

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rant is not entitled to bail." In 8 Ency. Pl. & Pr., 821, it is said: "A person held under a warrant of extradition issued by the governor of the state, upon which demand is made for his surrender, will not be allowed bail, but where he is held under preliminary process to await extradition, many of the states provide by statute for the allowance of bail."

In *Ex Parte Erwin*, 7 Tex. App., 288, bail was held to be improper pending an appeal—just the case under consideration —and that the right of bail under the constitution does not obtain in extradition cases.

Our own statutes put our state on this line. Section 2227, Code 1892, expressly excludes for the benefit of the writ of *habeas corpus* "any person *charged with an offense* committed in any other part of the United States, and who, agreeably to the constitution of the United States or the law of the state, *ought to be delivered up to* the executive power of the state or territory where the offense is charged to have been committed." In the present case the judgment of the chancellor is that Wall should be delivered up, and this judgment is conclusive while unreversed. Section 1470 *et seq.* allow bail, in bailable cases, in inquiries before conservators of the peace *before* demand by requisition. The governor acted, in the present case, on sec. 2162, on requisition, in proper form, based on a proper record.

Petition denied.

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CASES ARGUED AND DECIDED

—— IN THE ——

SUPREME COURT OF MISSISSIPPI,

—— AT THE ——

NOVEMBER TERM, 1904.

EMILE CHRISMAN *v.* CITY OF JACKSON.

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1. MUNICIPALITIES. *Legislative ordinance. Self-executing. Laws* 1860, *p.* 304, *ch.* 261, *sec.* 4.

Where by act of the legislature (Laws 1860, p. 304) it is provided that "all offenses against the criminal laws of this state occurring in the limits of a designated city, not amounting to a felony, shall be deemed violations of the ordinances of the city and punishable as such, it is unnecessary to the prosecution of a party charged thereunder that the city should have enacted an ordinance covering the case, since the legislative act is independent of the city's action.

2. SAME. *Codification of ordinances. Code* 1892, § 3010.

Proof of a compilation of the existing ordinances of a city and their codification, under Code 1892, § 3010, authorizing such codification, after the adoption by the city of the code chapter on municipality (Code 1892, chap. 93), is evidence that an ordinance therein contained is duly in force.

3. SAME. *Coming under code. Ordinances.*

When a city, town, or village comes under the code chapter on municipalities (Code 1892, chap. 93), it is not required to republish its ordinances.

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Brief for appellant.

FROM the circuit court of, first district, Hinds county.

HON. DAVID M. MILLER, Judge.

Affidavit was made in the police justice's court of the city of Jackson against appellant, Chrisman, for unlawfully selling intoxicating liquor. He was tried and convicted, and appealed to the circuit court. On the trial in the circuit court the mayor of the city of Jackson was introduced as a witness, and testified that, under the provisions of an ordinance directing him to do so, he compiled the existing city ordinances, in 1900, which were codified in pursuance of § 3010, Code 1892. This compilation was then introduced in evidence. The district attorney also introduced in evidence ch. 261, p. 304, of the laws of 1860, which is set out in the opinion of the court. The mayor was asked on cross-examination if there was ever any publication of these ordinances, and he answered that he did not know. The defendant then moved the court to exclude the testimony of the mayor in regard to the city ordinances on the ground that proof of publication of the ordinances was not shown. The motion was overruled, and defendant excepted. Defendant was convicted, and sentenced to pay a fine and to imprisonment in the county jail, and appealed to the supreme court.

P. H. Lowry, for appellant.

Is it necessary for the prosecution to prove the publication of the ordinance upon which the charge is based, in order to secure a conviction? The contention of the city attorney is that the proof of the ordinance before the mayor's court is unnecessary, and therefore that the proof is unnecessary on the trial of the case on appeal to an appellate court, although the case is to be tried *de novo.* I respectfully submit that this contention is not sound. Section 86, of the code, prescribes that after a defendant in a criminal case has complied with all the requisites in cases of appeal, "on his appearance in the circuit court the case shall be tried anew, and disposed of as other cases

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Brief for appellant.

pending in said court." I submit that the case of *Naul* v. *McComb City,* 70 Miss., 699, is conclusive of the case at bar.

Thompson & Stricker, on the same side.

We submit that the city of Jackson had no ordinance against the sale of liquor. It was for this reason that proof of publication could not be made.

Code 1892, § 3008, and other portions of the chapter on municipalities define clearly how a municipality must pass ordinances. Exercising limited legislative functions, having no inherent power, and being a mere creature of the legislature, a sort of a governmental agent, created for certain definite purposes, and acting on the authority of the sovereign in a particular manner and locality, it can do nothing but what the legislature allows it to do, nor in any other manner than that prescribed. Any act out of its sphere is, in its nature, an independent act, presuming independent power, which no municipality possesses. A municipal corporation is no more than one of the various roads through which the government reaches the public, one of many mediums through which the sovereign touches certain interests. The real power, the seat of authority, transcends this corporate agency. It exists only by sovereign permission. *People* v. *Assessor of Watertown,* 1 Hill, 616.

It depends for its existence upon legislative acts, and to that it owes its vitality. *Dartmouth College* v. *Woodworth,* 4 Wheat., 518, 636; *First National Bank Case,* 42 Mo., 581; *Martin* v. *Dix,* 52 Miss., 53.

Pretending to avail itself of an act of the legislature of 1898, Laws 1898, ch. 75, entitled an act to confer upon the mayor and board of councilmen of the several cities, towns, and villages of this state, power to pass ordinances providing for the punishment of all acts which are offenses against the laws of the state, and punishable thereunder, when committed within the corporate limits of cities, towns, and villages, the mayor and board of aldermen of the city of Jackson passed the

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Brief for appellee.

pretended ordinance which attempts to include with one fell swoop all offenses against the state laws, something neither contemplated nor allowed by the code.

McWillie & Thompson, and *William Williams,* attorney-general, for appellee.

Is it necessary for the prosecution to prove the publication of the ordinance upon which the charge is based in order to secure the conviction of an offender? We think not. Certainly it would be an anomaly to require such proof, or proof of the ordinance itself, in the trial before the mayor, the municipal court. Do not the courts of a municipality take judicial notice of its ordinances? Most certainly they do. *Moundsville* v. *Velton,* 35 W. Va., 217 (s. c., 13 S. E. Rep., 373); Dillon, Municipal Corporations, sec. 413 (24 Kan., 211). How absurd it would be to require proof of every ordinance before the mayor's court!

If it is unnecessary to prove the ordinance before the mayor's court, does it not logically and reasonably follow that it is unnecessary to make the proof upon the trial of the case on appeal, even if the trial be on appeal *de novo?* Are not appellate courts required to take judicial notice of everything of which the court of original jurisdiction is authorized to take such notice? We think so. See authorities above cited.

It is true that in the case of *Naul* v. *McComb City,* 70 Miss., 699, this court seems to have decided otherwise, and to have held that the circuit court, on an appeal from a municipal court, would not take judicial notice of the ordinances of the municipality. But we respectfully submit that this court in that case erroneously applied the general rule to a case which clearly fell within a well-defined exception to the rule.

The general rule (the one erroneously applied in *Naul* v. *McComb City, supra*) is that courts will not take judicial notice of municipal ordinances, but the exception is that municipal courts will take such notice, and that all other courts

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while exercising appellate jurisdiction on appeals from the courts of the municipality, even if the trial be *de novo,* will also take such notice. See authorities cited *supra.*

In this case, however, in deference to the decision in *Naul* v. *McComb City,* proof of the ordinance was duly made. This proof reduced the question to whether proof of publication of the ordinance was necessary to conviction. The Naul case, *supra,* has probably turned loose more criminals in this state (we are thankful that they were misdemeanants) than all other judicial decisions ever made by this court, and it ought to be overruled; but whether it is or not, the judgment appealed from in the case at bar should be affirmed so far as concerns the question we are discussing.

Whether proof of the publication of an ordinance be necessary in any suit based upon the ordinance is a matter determinable by statute. We find many judicial authorities holding such proof necessary, but all of them, so far as we know, are based on statutory provisions. In many states it is provided by statutes that municipal ordinances shall not become operative until after publication, and in one state, at least, there is a constitutional provision to that effect. Of course the decisions of the courts of such states require proof of the publication because of such statutory or constitutional provision. Run out all authorities holding proof of publication necessary, and it will be found, we think, that they all rest on such a provision, and if one be found which is not so supported, it is wrongfully founded on those which are, and will illustrate the danger of following judicial decisions without observing the controlling idea or basis on which they rest.

We have neither a statutory nor a constitutional provision of such character. Our chapter on municipalities (ch. 93, Code 1892) sharply draws the distinction between ordinances which are to take effect only after publication and those which take effect without reference to publication, and the ordinance in-

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volved in this case is not of the class which are to be published before becoming operative.

Look at Code 1892, § 2912a (the amendments to it are immaterial in this connection), and it will be seen that an ordinance passed under it does not, and cannot, "become operative until it shall have been published for three weeks," etc. Now turn to Code 1892, § 3006, and see that the requirements are "that ordinances . . . shall, as soon as practicable after they are passed, be published . . . for three weeks," and that they shall not be enforced, "unless for cause the contrary be ordered," for one month after their passage.

Not only is there an absence from sec. 3006 of a provision making the operation of ordinances depend on publication, such as is found in sec. 2912a, but the municipal authorities are expressly empowered to put them in force at once. The very existence of this power is incompatible with the idea that their operation depends on publication.

The legislature knew how to make the operation of ordinances depend on publication when it was desired to do so, and did so unmistakably in sec. 2912a. In sec. 3006, however, no such requirement is to be found. The provision in that section pertaining to publication is merely directory, because immediately following it in the same section the legislature treats of the subject as to when ordinances are to become operative, and provides that "ordinances shall not be enforced, unless for cause the contrary be ordered, for one month after their passage." It does not say after their publication, or after their passage and publication, but it does fix the time for them to become operative as one month after passage, unless for cause they be put in force at once.

Of course all ordinances under sec. 3006 stand on the same footing touching publication as a prerequisite to their becoming operative. If it can reasonably be said that the provision that "all ordinances shall be published" requires publication before they become operative, it means what it says—all ordi-

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nances; and yet it is idle to say, under the section, that an ordinance cannot for cause be made to take effect at once. Therefore all ordinances are not required to be published before taking effect. Some ordinances, therefore, do not have to be published for three weeks before becoming operative. Which ones? The section does not draw any distinction. They are all directed to be published. The truth is, when we examine the section to ascertain the conditions upon which ordinances are to become operative, we find it in the last lines of the section in these words, "And ordinances shall not be enforced, unless for cause the contrary be ordered, for one month after their passage." The passage of an ordinance coupled with the mere lapse of time is the only condition to their enforcement, and the lapse of time may, for cause, be dispensed with by the municipal authorities.

The statute does not anywhere require the municipal authorities to adjudge that publication has been made, save in the one class of ordinances which cannot, by express legislative provision, be enforced until after publication, and that is found in Code 1892, § 2914. This demonstrates legislative intent that all other ordinances do not depend upon publication for their validity.

TRULY, J., delivered the opinion of the court.

The ordinance on which this prosecution is based was properly proven on the trial. The record shows that the district attorney introduced ch. 261, p. 304, of the Acts of 1860, being a legislative amendment of the charter of the city of Jackson. A reading of that act discloses that the fourth section thereof provides that "all offenses against the criminal laws of this state occurring within the limits of said corporation, not amounting to a felony, shall be deemed violations of the ordinances of the city of Jackson and punishable as such." This was a part of the fundamental law of the city, requiring no ordinance to put it into operation or effect. Under that law any violation

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of the criminal laws of the state, if a misdemeanor, could have been prosecuted in the name of the city, even had no special ordinance ever been adopted embodying this provision. The record further shows proof of a compilation of all existing ordinances in 1890, and the codification thereof pursuant to the provisions of § 3010, Code 1892, subsequent to the adoption by the city of the code chapter on "Municipalities." This was positive and direct evidence that the ordinance for the violation of which appellant was convicted was duly in force. The ordinances in force at the date of the acceptance of the municipal chapter did not require another publication, even conceding, which we expressly do not, that after proof has been made of the existence of an ordinance, and that it had been regularly adopted, still it devolves upon the city to show that the ordinance had in fact also been published. In case of ancient ordinances this would often be impossible.

Affirmed.

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Statement of the case.

WILEY H. CLIFTON ET AL., EXECUTORS, v. TURNER CLARK ET AL.

1. COMPROMISE OF LITIGATION. *Attorney and client. Compensation.*

Where a controversy touching the probation of claims against the estate of a decedent was referred to auditors whose report, after much evidence had been introduced by the parties, allowed some of the claims and disallowed others, and the parties mutually agreed to and did acquiesce and consent to a confirmation of the report and payment was made accordingly, there was a compromise of the litigation within the meaning of a contract between one of the parties and his attorney providing for a lesser fee in case the litigation should be compromised than the sum agreed to be paid if it were prosecuted to judgment.

2. SAME. *Chancellor's finding. Equitable compensation.*

Where under the terms of a contract between a litigant and his attorney the fee of the attorney was to be equitably diminished from the maximum sum agreed to be paid should the suit be compromised, the findings of the chancellor as to what was equitable in the premises will not be reversed because the client settled more favorably with other attorneys for like services.

FROM the chancery court of Lee county.

HON. HENRY L. MULDROW, Chancellor.

Clark and others, composing the firm of Clark, Hood & Co., appellees and cross-appellants, were complainants in the court below; Clifton and others, executors, appellants and cross-appellees, were defendants there. From a decree partly favorable to defendants they appealed to the supreme court, and complainants prosecuted a cross-appeal.

The case was once before in the supreme court, and the decision then rendered is reported. *Clifton et al., Executors,* v. *Clark et al.,* 83 Miss., 446 (s. c., 36 So. Rep., 251).

Col. J. A. Blair, an attorney at Tupelo, Miss., died, and left a last will, and Clifton and Stribling, appellants, qualified as executors of the will. Clark and others, appellees, probated

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Brief for appellants and cross-appellees.

a claim against the estate of Blair for $390.55, which was not paid, and they filed their bill in the chancery court against the executors to recover that claim. The executors filed a cross-bill, claiming as an offset fees due by complainants to Blair for legal services rendered. On final hearing first had in the court below the cross-bill was dismissed, and a final decree rendered against the executors for the amount of complainants' claim. From that decree the executors appealed to the supreme court, where the decree was reversed, with direction to the chancellor to state an account between the parties, and to calculate the amount due by complainants to the estate of Col. Blair under a contract between Blair & Anderson and Clark and others, the present appellees. See the previous report of the case. The contract between Blair & Anderson and their clients contained the clause, quoted in the opinion of the court, looking to a diminution of their fee if the litigation should be compromised. Other facts are stated in the opinion.

McWillie & Thompson, for appellants and cross-appellees.

As strange as it may seem, the only question on this appeal is whether or not the litigation in which the contingent fee was contracted for was or was not compromised within the terms of the fee contract.

The facts are these beyond dispute or controversy: The litigation was bitterly and operosely contested and fought out until the claims sought to be probated were submitted to and determined by auditors. The auditors reported allowing of the claims covered by the fee contract the sum of $26,469.45. Both parties were dissatisfied, and for a time contemplated excepting to the report. They, however, agreed that neither would except, and that the report should be confirmed by the court, and that the sum so found and reported should be paid and received, thus ending controversy. The report of the auditors was confirmed and the sum found paid. The whole idea of a compromise of the litigation rests on this, and nothing more.

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Brief for appellants and cross-appellees.

What was done did not amount to a compromise of the litigation. It was rather an agreement (if agreement at all) to abide by and perform the result of the litigation then reached. If the parties had not conferred, but each had separately determined in their respective minds not to file exceptions to the report of the auditors, but to accept their findings, the same result would have followed.

If what was done was a compromise of anything, it was not a compromise of the litigation, but was rather a compromise of their respective objections to the result reached by the auditors.

A failure to appeal is not a compromising of litigation, nor is a failure to except to the report of auditors, even if both of the parties so fail. Certainly this is true where the failure of one is not attributable to the failure of the other. We cannot see that it makes any difference that the failure of each is attributable to the failure of the other. The auditors' findings were permitted to stand and to be enforced. How that which is permitted to stand and be enforced can reasonably be said to have been compromised, we do not understand. The result reached by the litigation was not compromised, but was enforced. A compromise implies the yielding of something by both of the parties. Neither in this case yielded anything from the result of the litigation. It cannot be, therefore, that the litigation was compromised, even if it be true that the dissatisfactions of the parties with the findings were mutually surrendered.

The following authorities show what is a compromise: Anderson's Law Dictionary, title Compromise; *Bellows* v. *Sowles,* 55 Vt., 391 (s. c., 45 Am. St. Rep., 621). This last cited case defines a compromise thus: "A compromise is the yielding of something by each of two parties, and can only exist when something is yielded by each party to it." See 45 Am. St. Rep., near bottom p. 623; *Foster* v. *Metts,* 55 Miss., 77, fourth line from bottom p. 82.

So far as concerns the claim of cross-appellants, that a greater

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Brief for appellees and cross-appellants.

deduction should have been made from Col. Blair's fee than was made by the chancellor, and which is predicated of the fact that Allen & Robbins deducted one-third of their fee, there are two perfect answers:

First—The contract between Allen & Robbins and Clark and others is wholly different from the Blair & Anderson contract.

Second—Allen & Robbins might do what they pleased by way of yielding to even unjust demands of Clark and others, but they could not thereby bind Blair's executors, nor establish a precedent controlling upon the chancellor.

The same observations are applicable to the contract between Clark and others and W. D. Anderson, made after the death of Blair—Anderson's new contract. In both of these contracts, the one with Allen & Robbins and the one with Anderson, the word "compromise" is perhaps used in the sense of "settlement;" but whether it be so used or not, the fact that Allen & Robbins, on the one hand, and Anderson, on the other, consented to rasp down their fees, in no way affected the right of Blair's executors and in no way bound the chancellor to make the same deduction.

Anderson & Long, for appellees and cross-appellants.

The burden of proof was on the appellants of establishing the fee. It devolved on them to prove their case made by the cross-bill. The fee contract with Blair & Anderson is a part of the cross-bill. The burden was on the appellants to establish that there was no compromise of the claims on which the fee was based.

The chancery court in its decree found as a fact that there had been a compromise of the claims covered by the fee contract of Blair & Anderson, and also found as a fact that three-fourths of the contract fee was a reasonable and equitable fee to go to the estate of J. A. Blair for his services. These were not questions of law, but of fact; and in the supreme court the findings of the chancellor will be treated like the verdict of a jury, and will not be disturbed unless against the clear pre-

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ponderance of the proof. *Stevens* v. *Magee*, 81 Miss., 644; *Derdeyn* v. *Donovan*, 81 Miss., 696. The presumption in favor of a decree includes, however, conclusion both of law and fact. *Partee* v. *Bedford*, 51 Miss., 84.

After the award of the auditors the testimony shows both sides were dissatisfied with their findings, and contemplated and were taking steps to take the matter to the chancery court, the contestants contending that the $26,469.45 ought not to have been allowed, and the contestees, that a very much larger amount should have been allowed. In this condition the matter was compromised by the contestants agreeing that the estate of R. C. Clark should pay the amount awarded by the auditors, thereby surrendering their contention theretofore made, and which they had contemplated to follow up in the chancery court and the supreme court if necessary, and the contestees on their part agreeing to accept the award of the auditors and surrender their claim to more than twice the amount awarded, which they had contended for before the auditors, and contemplated continuing such contention in the chancery court. If this was not a "yielding of something by each of two parties," we do not know what you would call it. The case of *Foster* v. *Metts*, 55 Miss., 77, has no application to the question here presented.

Bellows v. *Sowles*, 55 Vt., 391 (s. c., 45 Am. St. Rep., 621), holds that "a compromise is the yielding of something by each of two parties, and can only exist when something is yielded by each party to it." That is exactly what was done in the compromise of these claims.

The Blair & Anderson fee contract provides that in case the claims are compromised one-fourth shall be deducted from the fee and not more than one-half, "as may be equitable under the circumstances." Is it equitable for Blair's estate to get a larger per cent of his fee than Robbins and Anderson? It appears to us to be unconscionable and unequitable, in view of the state of this case, for Col. Blair's estate to get a larger per cent of the fee than his associate counsel.

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Opinion of the court.

The chancellor erred in reducing Blair's share in the fee only one-fourth on account of compromise. We believe that it should have been reduced as much as one-third. Of course we understand that the authorities we have cited holding that the decree of the chancellor will not be disturbed unless against the clear weight of evidence would apply with the same force against this contention as against that of the appellants were the evidence the same. However, it appears to us that the clear preponderance of proof shows that an equitable allowance to Blair's estate would be two-thirds of the contract fee.

TRULY, J., delivered the opinion of the court.

On the former appeal of this case it was reversed and remanded (83 Miss., 446; s. c., 36 South., 251), with direction to the chancellor to state an account between the parties and calculate the amount due by Clark, Hood & Co. to the estate of John A. Blair under the contract between Blair & Anderson and Clark, Hood & Co. That contract recites that Blair & Anderson were to receive a stated contingent fee for legal services to be rendered in and about matters mentioned therein, and contains this provision: "If said litigation is compromised in respect to said claim, then the parties of the second part (Blair & Anderson) agree to deduct not less than one-fourth nor more than one-half of the contingent fee as may be equitable under the circumstances." The chancellor decided that the litigation which Blair & Anderson had been employed to conduct had been by the parties compromised, and rendered a decree reducing the fee to which the estate of Blair was entitled by deducting one-fourth of the amount originally stipulated by the terms of the contract. From this decree the executors of Blair appeal, contending that there was in fact no compromise of the litigation, and therefore the fee should have been calculated at the full amount originally stated in the contract, and that the deduction was erroneous. Clark, Hood & Co. prosecute a cross-appeal, and insist that the finding of the chancellor that the litigation

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Opinion of the court.

was compromised was correct, but that the deduction of one-fourth was not "equitable under the circumstances," and that the fee should have been reduced by one-third.

The record, as presented upon the former appeal, and considered in connection with this, demonstrates the correctness of the conclusion of the chancellor in holding that the litigation between the parties was terminated by compromise. The suits never reached a final decision by any court, but after the report of the auditors of the chancery court, though both parties were dissatisfied therewith, they agreed to accept and abide by it as final, and a decree was entered in accordance with the compromise. By this agreement one side abandoned all contest as to the claims allowed by the auditors, while the other side ceased all attempt to enforce the collection of other claims to a very large amount, then pending, some of which, according to the testimony, their lawyers were reasonably certain of having allowed upon the presentation of the auditors' report to the chancery court. This arrangement was in every true sense a compromise within the meaning of the contract in question. This disposes of the contention of appellants adversely to their claim.

The contention of appellees (cross-appellants) presents a question of more difficulty. It is based on the fact that the counsel who continued the prosecution of the litigation after the death of Col. Blair upon the consummation of the compromise between the parties litigant reduced their contingent fee by a deduction of one-third, as being a settlement which was equitable under the circumstances. So it is urged, as this was their opinion of what constituted an equitable settlement, and as their testimony was the only positive proof that the chancellor had on which to base his conclusion on this point, that decree should have only allowed to the estate of Blair the same fee that other counsel claimed. But the answer to this argument is that in making a settlement of their individual and private business with their clients, these attorneys were dealing

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Statement of the case.

strictly with their own, and had the power and an undoubted right to make such reduction as they thought advisable; but the chancellor was not confined to a consideration of this testimony, but had the whole record before him, and, in view of the vast amount of labor which had been bestowed by the attorneys on the preparation and prosecution of these claims, and considering the substantial benefit of this labor as shown by the award of the auditors, decided that a reduction of one-fourth, being the minimum amount stipulated by the contract, was just and equitable to all concerned. We see no sufficient grounds for disturbing his conclusion in the premises.

The decree appealed from is affirmed both on direct and cross-appeal.

CITY OF GREENWOOD *v.* THOMAS R. HENDERSON ET AL.

MUNICIPALITIES. *Judicial acts. Appeal. Code* 1892, § 79.

Under Code 1892, § 79, providing that on appeal from the mayor and board of aldermen of a municipality the circuit court shall hear and determine the case "as presented by the bill of exceptions as an appellate court," it is not competent for the court to consider oral testimony even by agreement of the parties, although the witnesses be none other than those examined before the municipal authorities.

FROM the circuit court of Leflore county.

HON. WILLIAM F. STEVENS, Judge.

Proceedings by Henderson and others, appellees, protesting against the adoption of an official map by the city of Greenwood. From an order of the municipal authorities adopting the map over the protest an appeal was taken to the circuit court. From the judgment of the circuit court reversing the order the city appealed to the supreme court.

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Brief for appellant.

The mayor and board of aldermen of the city of Greenwood, acting under Acts 1898, p. 63, ch. 42, passed an order to have a survey and map of the city made, which was done, and placed on file in the mayor's office. Appellees filed in said office protests setting up reasons why the map should not be adopted as the official map of the city. Upon the hearing of these protests witnesses were examined concerning the correctness and accuracy of the map, and an order was passed adopting the map, and from that order an appeal was taken to the circuit court; and in trying the appeal the circuit court heard the oral evidence of several witnesses, and rendered a judgment reversing the order made by the mayor and board of aldermen.

Lomax & Tyson, for appellant.

The court erred in trying *de novo* the appeal from the action of the board of mayor and aldermen in adopting map of Johnson as official map of the city of Greenwood. Authority for appeal in this case is given by § 79, Annotated Code 1892, and appeal to circuit court can be had only by method therein prescribed, the appeal not being a matter of right, but being created by statute.

Requirements of statute for taking and perfecting appeals are deemed jurisdictional, and must be strictly complied with. 2 Ency. Pl. & Pr., 16; *Lyles* v. *Barnes,* 40 Miss., 608.

In a case appealed to circuit court from action of board of supervisors, under a statute identical with the one under which this appeal was taken, the supreme court held that such appeal must be taken and tried on bill of exceptions in order to confer jurisdiction on circuit court as an appellate court. *Bridges* v. *Supervisors,* 57 Miss., 253.

The agreement of W. S. Vardaman, mayor, that oral evidence might be heard on the trial of the case in circuit court was of no binding effect, for the reason that agreement of parties could not confer on the court a jurisdiction which it did not

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have by law. 2 Am. & Eng. Ency. Law, 24; *Lyles* v. *Barnes*, 40 Miss., 610; *Lester* v. *Harris*, 41 Miss., 668.

S. R. Coleman, for appellees.

There was a bill of exceptions on file, and the only way to have attacked it for insufficiency was by motion to strike out or to quash (3 Ency. Pl. & Pr., 498, 499); and, besides, the agreement was not that the case should be tried anew, in the circuit court, but that the witnesses who testified orally before the board could be examined in the circuit court, making quite a difference from the case of *Bridges* v. *Supervisors*, 57 Miss., 252.

CALHOON, J., delivered the opinion of the court.

We are constrained to hold that an appeal from a municipal board to a circuit court can be heard only on a bill of exceptions "embodying the facts and decisions of the board," under § 79, Code 1892. The appeal must be heard and decided on the record so made, and cannot be considered on oral testimony by agreement of the parties, whether or not confined to witnesses examined before the board. It is jurisdictional under the statute.

Reversed and remanded.

SUGGESTION OF ERROR.

After the delivery of the foregoing opinion the following suggestion of error was filed:

McWillie & Thompson, and *S. R. Coleman*, for appellees.

The appellees, by the undersigned, their attorneys, respectfully suggest to the court that it committed error in its judgment reversing and remanding this cause.

The error does not consist so much, in our judgment, in the holding by this court as expressed in its opinion that an appeal from a municipal board to the circuit court can be heard only

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on a bill of exceptions embodying the facts and decisions of the board under Code 1892, § 79, as in holding *by implication* that there was no bill of exceptions shown of record in this case. There is a bill of exceptions of record. This bill of exceptions (though not called a bill of exceptions) is found of record. It was approved and signed by the mayor on the 2d day of August, 1899, and attested by the clerk *pro tem* of the municipal court. This bill of exceptions shows that an agreement as to maps and plats of the town or city was introduced in evidence and was the first evidence offered after the introduction of a copy of the minutes of the municipality touching the matter in controversy. The agreement was attached to the bill of exceptions, and of course a part thereof. Thereafter various witnesses were introduced, and the agreement made that they might testify orally in the trial on an appeal, and the agreement was reduced to writing and is made a part of the bill of exceptions. On page 11 of the record we find this agreement, which is a part of the bill of exceptions. It is as follows:

"It is agreed by said board and said protestants that there are of record the plats of the Douglass part, Henry addition, Johnson survey, and Moore addition to the former town, now city, of Greenwood, and the only original plat not of record is the Howard part.

"It is further agreed that a map of all parts of said town, now city, of Greenwood is, and has been, in the mayor's office, made by a competent surveyor. Said map has not been adopted as the official map."

Our opinion is that this bill of exceptions properly carried the case to the circuit court, and it ought there to have been heard on the bill of exceptions. The circuit court had jurisdiction because the bill of exceptions was a part of its record. The question of its sufficiency to settle the case in favor of the protestants is another and a different matter from one of jurisdiction.

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Suggestion of error.

We insist that the bill of exceptions was sufficient to show that the municipal authorities of Greenwood were without power in the premises; and, being without power, its judgments should have been vacated by the circuit court, as was done. The only statutory or other power in the premises conferred by the legislature on municipalities is found in ch. 42, Laws Miss. 1898, p. 63, and it will be noted that this statute does not confer such power *on all municipalities.* The statute simply authorizes *"the boards of mayor and aldermen and boards of mayor and councilmen of any cities, towns, and villages in this state, the survey or surveys, maps and plats thereof, which have been lost or destroyed without having been recorded, or where they have no such surveys, maps, or plats,"* to act in the premises by providing for a new survey and maps. The city of Greenwood is shown by the bill of exceptions not to be within the terms of this statute. The agreement, a part of the bill of exceptions, negatives the idea that the previous survey or surveys, maps and plats of Greenwood had been lost or destroyed without having been recorded, and it also negatives the idea that there were never before maps and surveys of Greenwood. Whatever may have been testified to by witnesses orally cannot be conceived to have negatived this written agreement of the parties litigant to this suit. An examination of their testimony in this record is convincing that they did not negative the agreement, which is a part of the bill of exceptions.

We have, therefore, this case: An appeal was presented from the board of mayor and aldermen of the city of Greenwood to the circuit court. This appeal is based upon a duly signed bill of exceptions made a part of the record. It is true that the bill of exceptions contains *an agreement* that the witnesses who had testified before the municipal court might testify orally in the circuit court, but the bill of exceptions does contain an agreement between the parties litigant made before and in the presence of and filed with the board of aldermen, showing previous maps, plats, and surveys of the city of Greenwood, and

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Statement of the case.

that they were still in existence. This showing, we contend, was sufficient for the determination of this case in favor of the appellees. The agreement showed clearly that the municipal authorities were without *power under the statute;* and being without power, their judgment, whatever it was in the premises, should have been reversed, vacated, and annulled by the circuit court; and this being true, the right result was reached in the circuit court; and the right result having there been reached, this court ought to have affirmed its judgment.

This suggestion of error was by the court overruled.

NAPOLEON B. RAINES *v.* JOHN R. BAIRD.

CONTRACT TO CONVEY LAND. *Description. Name of tract. Ambiguity.*

A contract purporting to obligate the owner to convey a tract of land by name (as the "Phil Allen place") and naming the number of acres therein, does not contain a patent ambiguity, and it is valid where by extrinsic evidence it can with certainty be shown what lands were known by the name.

FROM the chancery court of Sunflower county.

HON. PERCY BELL, Special Chancellor.

Raines, the appellant, was complainant, and Baird, the appellee, defendant in the court below. From a decree in defendant's favor the complainant appealed to the supreme court.

Raines filed his bill to enforce the specific performance of the following written contract: "It is hereby understood and agreed by and between John R. Baird, of the first part, and Napoleon B. Raines, of the second part, that for the consideration of eight hundred dollars, to be paid in five annual installments each of equal amount and settled by five promissory notes of equal amounts bearing interest at ten per cent per annum from January 1st, 1887, the party of the first part agrees to sell, bar-

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Brief for appellant.

gain, and convey to said party of the second part that tract of land adjoining section 9, and known as the Phil Allen place, containing eighty acres more or less, and the party of the second part further agrees to secure the party of the first part in the payment of said notes and interest thereon by deed of trust on said land." In his answer defendant alleged that the contract was void because of a patent ambiguity in the description of the property sold. On cross-examination defendant, Baird, was asked if he could describe the Phil Allen place by section numbers. His answer was as follows: "The place was called the Phil Allen place because occupied by a negro named Phil Allen. A proper description of the land is as follows: It is in the N. E. 1-4 of section 17, township 17, range 4 west, and is that part of the N. E. 1-4 which is east of a cypress brake dividing the quarter, and most of the land is in the N. ½ of said quarter; being all the N. E. 1-4 east of the brake." On the final hearing the chancellor held that the contract was void because of patent ambiguity in the description of the land. Complainant's bill was dismissed.

Johnson, Chapman & Neill, for appellant.

As fully appears from reading the final decree of the chancery court, the bill was dismissed because the special chancellor thought the description void by reason of patent ambiguity. The description is "that tract of land adjoining section 9, and known as the Phil Allen place, containing eighty acres more or less." It was the argument of counsel, assented to by the court, that the description in the paper, not giving section, township, range, county, or state, could not be explained by parol evidence; that there were so many things left open to "be holpen by averment" that the law would allow none of it. While counsel and court did not make it very clear where the line is to be drawn in cases of general description as distinguished from cases of description by metes and bounds and location, they were very positive "the Phil Allen place" was a description

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Brief for appellee.

clearly under the ban, and not to be tolerated. The defendant, Mr. Baird, makes it very clear what was meant by the "Phil Allen place." See his answer to the first cross interrogatory. We had thought that this particular phase of the much-mooted subject of latent and patent ambiguity was so well settled and generally understood both by bench and bar that this court would not be called upon again to explain that general descriptions, such as the "Estate of Blackacre," "the estate purchased of A," "the farm in the occupation of B," "a certain tract called Beaver Dam," "the Mitchell or Busby place," "Briarfield plantation," "Black Ankle farm," "the Pruett place," "that tract of land known as the Phil Allen place," are entirely sufficient; and that extrinsic evidence is always admissible to identify, locate, point out, and give the boundaries of the property conveyed. *Kyle* v. *Rhodes,* 71 Miss., 487; *Eggleston* v. *Watson,* 53 Miss:, 340; *Bowers* v. *Andrews,* 52 Miss., 601 (opinion by Simrall, J.); *Eufaula Nat. Bank* v. *Pruett,* 30 So. Rep., 731; *Angel* v. *Simpson,* 3 So. Rep., 758; 8 Waite's Actions and Defenses, 224.

McWillie & Thompson, for appellee.

There is testimony in the record upon which a decree might have been rendered in favor of the defendant, Baird, on the idea that the writing had been abandoned, but the chancellor did not pass upon this question; he simply adjudged the contract void because of a patent ambiguity in the description of the land attempted to be described.

The chancellor's decision adjudging the contract utterly void because of a patent ambiguity is based upon decisions of this court, which were controlling in the court below, one of the cases being *Bunckley* v. *Jones,* 79 Miss., 1.

It will be seen that there is nothing to show whether the contract was executed within or without the state of Mississippi. There is nothing to show within what county or state the land lies; nothing to show in what section, township, or range it lies,

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Opinion of the court.

nor what are the metes and bounds of the tract, nor its shape. The only thing in the instrument which, in the remotest degree, tends to render certain the description is found in the three words: "Phil Allen place." What Phil Allen place? Where is it?

Thos. R. Baird, on same side.

It is well settled that every conveyance of land must define its identity and fix its locality. "That tract of land adjoining section 9, and known as the Phil Allen place, containing eighty acres more or less." Could the very best civil engineer or surveyor take the contract with that description and locate the land? Into what state would he go? Into what county in any state would he go? What section 9 could he find? Where could he go to inquire for the "Phil Allen place?" What clew appears in such description, which, if followed, would lead to its identity? If this is not a patent ambiguity, we have failed to understand the authorities aright. It is not like "My Wannanaw plantation in Holmes county." *Bowers* v. *Andrews,* 52 Miss., 596; *Bunckley* v. *Jones,* 79 Miss., 9.

TRULY, J., delivered the opinion of the court.

There is no patent ambiguity on the face of the contract of sale sued on herein. It falls within the well-established rule which is so lucidly expressed by Woods, J., in *Kyle* v. *Rhodes,* 71 Miss., 491 (15 South., 40), as follows: "It is a general rule that, where parcels of real estate are conveyed by well-known designation, such conveyances are valid, though resort to extrinsic evidence may be necessary to show what was accurately included in the general description employed in the conveyance. In the case at bar the memorandum in writing describes the premises by reference to extraneous facts, and in such instances it is proper to resort to extrinsic evidence to ascertain those facts, in order to show what was embraced in the general designations of the land which were employed by the grantor."

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Opinion of the court.

That resort to the extrinsic evidence referred to in the contract determined with definiteness and certainty the premises intended to be conveyed, the testimony of the appellee herein clearly proves. The instrument was not void for uncertainty. We content ourselves with the ruling on this point, as it was on this alone that the chancellor based the final decree. We remand the cause for hearing upon the merits, intimating no opinion upon the other contentions appearing in the record.

Reversed and remanded.

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The owner of land abutting on a street, whether he own the fee to the street or it be in the municipality, is entitled to compensation for any additional servitude placed on his property by any use of the street not incidental or necessary to its enjoyment as a street by the public. *Hazlehurst* v. *Mayes*, 7.

2. SAME. *Code* 1892, § 2945. *Closing streets. Compensation. Abutting property owners.*

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AMBIGUITY.

CONTRACT TO CONVEY LAND. *Description. Name of tract. Ambiguity.*

A contract purporting to obligate the owner to convey a tract of land by name (as the "Phil Allen place") and naming the number of acres therein, does not contain a patent ambiguity, and it is valid where by extrinsic evidence it can with certainty be shown what lands were known by the name. *Raines* v. *Baird*, 807.

AMENDMENTS.

1. ATTACHMENT. *Writ. Defects. Service. Dismissal.*

Defects in proceedings by which an attachment writ was sued out and served will not justify the dismissal of the suit on the debt, nor deprive the plaintiff of the right to amend and sue out alias process. *Foote* v. *Hall Commission Co.*, 445.

2. LANDLORD AND TENANT. *Code* 1892, § 717.

A proceeding by a landlord to summarily remove his tenant holding over after the expiration of his term should not be dismissed because of a defective affidavit, unless the landlord declines to amend, as he has a right to do under Code 1892, § 717, authorizing amendments in pleadings and proceedings. *Bowles* v. *Dean*, 376.

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APPEALS.

1. ESTOPPEL TO PROSECUTE. *Consent to decree. Acceptance of proceeds.*

A creditor of the estate of a decedent who was a party to a suit by which title to land was adjudged to have been in the decedent at the time of her death and the decree in which ordered the land sold to pay debts, is estopped to appeal therefrom after the sale has been made, and, by his consent, confirmed and he has received the sum due him from the estate out of its proceeds. *Parsons* v. *Rutherford,* 70.

2. JUSTICE OF THE PEACE. *Appeal. Notice.*

Upon appeal from the judgment of a justice of the peace to the circuit court it is unnecessary to give notice of the appeal to the adverse party. *Rowe* v. *Cannon,* 101.

3. SAME. *Code* 1892, §§ 82, 84.

The execution of the appeal bond in such case, as required by Code 1892, § 82, and the transmission of the record to the circuit court, as required by Code 1892, § 84, has the effect of continuing the pendency of the suit. *Ib.*

4. SAME. *Circuit court. Dismissal. Amount of judgment.*

A plaintiff causing defendant's defective appeal to the circuit court to be dismissed is only entitled, upon defendant's failure to perfect the appeal, to a judgment in the sum for which the justice's court gave judgment, with interest and statutory damages, although the plaintiff's demand was for a larger sum. *Jacobs* v. *Johnson,* 450.

5. LANDLORD AND TENANT. *Summary proceeding. Code* 1892, § 2552. *Counter affidavit. Issue made in circuit court.*

The defendant in a proceeding by a landlord to summarily remove a tenant may, upon appeal, file his counter affidavit (Code 1892, § 2552) in the circuit court. *Bowles* v. *Dean,* 376.

6. MUNICIPALITIES. *Judicial acts. Appeal. Code* 1892, § 79.

Under Code 1892, § 79, providing that on appeal from the mayor and board of aldermen of a municipality the circuit court shall hear and determine the case "as presented by the bill of exceptions as an appellate court," it is not competent for the court to consider oral testimony even by agreement of the parties, although the witnesses be none other than those examined before the municipal authorities. *Greenwood* v. *Henderson,* 802.

7. SAME. *Extension of boundaries. Issue in circuit court. Time.*

The question whether a contemplated extension or contraction of the limits of a municipality be or be not reasonable, which is to be tried on an issue to be made up on an appeal to the circuit court

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APPEALS—*Continued.*

from an ordinance proposing the same under Code 1892, §§ 2912a, 2913, Amended Laws 1902, p. 154, authorizing such procedure and appeal and providing for such issue, is to be determined by the facts and circumstances at the time of the adoption of the ordinance. *Jackson* v. *Whiting*, 163.

8. MUNICIPALITIES. *Striking issues from files.*

Where a municipality, upon appeal from its ordinance proposing the annexation of adjacent territory, tendered in the circuit court the statutory issue, averring that the annexation proposed by its ordinance was reasonable, it was error to strike the issue so tendered from the files on a mere inference that the territory sought to be annexed was incorporated territory at the time the ordinance was adopted. *Ib.*

9. QUESTIONS REVIEWABLE.

Upon appeal from a chancery court the supreme court will not review matters which the court below expressly declined to pass upon, reserving the same for decision on fuller proof, nor will an assignment of error be considered which seeks to review the action of the court below holding an executor chargeable with a bond where after the appeal was taken the bond was accounted for by the executor. *Owens* v. *Owens*, 673.

10. RES ADJUDICATA. *Second appeal.*

Where the supreme court reversed a decree in defendant's favor and adjudged complainant entitled to recover a certain per centum of money received by defendant and remanded the case for an accounting, the judgment is conclusive on a second appeal of complainant's right to recover. *Nutt* v. *Knut*, 465.

11. STATUTE OF LIMITATIONS. *Code* 1892, § 2752.

Although an appeal bond be filed within two years after the rendition of the judgment sought to be appealed from, the appeal will be barred, under Code 1892, § 2752, limiting the time within which appeals to the supreme court shall be taken, if no citation be served on the appellee and no transcript of the record be filed in the supreme court before the expiration of such time. *Chambliss* v. *Wood*, 209.

APPEARANCE.

ARBITRATION AND AWARD. *Notice. Code* 1892, § 98.

Where the parties to an arbitration appeared by counsel at the hearing before the arbitrators, it is immaterial that the record fails to show that they were notified to so appear. (Code 1892, § 98.) *Mississippi Cotton Oil Co.* v. *Buster*, 91.

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APPOINTMENT.

DEED OF TRUST. *Substituted trustee. Attorney in fact.*

The attorney in fact of the beneficiary of a deed of trust cannot appoint a substituted trustee where the deed provides for the appointment "by the beneficiary or any holder of the notes secured or their legal representatives." *Allen* v. *Alliance Trust Co.*, 319.

ARBITRATION AND AWARD.

1. NOTICE. *Appearance. Code* 1892, § 98.

Where the parties to an arbitration appeared by counsel at the hearing before the arbitrators, it is immaterial that the record fails to show that they were notified to so appear. (Code 1892, § 98.) *Mississippi Cotton Oil Co.* v. *Buster*, 91.

2. SAME. *Informal award. Consent of counsel. Formal award. Time and place of signing. Code* 1892, § 104.

Where, after a hearing by arbitrators, the parties being represented before them by counsel, their findings were reduced to writing and signed by them at the same time and in the presence of each other, it is competent for the counsel to agree that the award so drawn may be afterward put in proper form, and in such case it is no objection to the formal award that it was not signed by the arbitrators at the same time and place. (Code 1892, § 104.) *Ib.*

3. SAME. *Umpire acting with arbitrators. Waiver of objection.*

An objection to an award, predicated of the fact that the umpire who was to be called upon to act only in case of a disagreement between the arbitrators selected by the parties, was sworn and acted with the arbitrators from the beginning, is waived if the parties are present at the hearing and do not object to such procedure. *Ib.*

4. SAME. *Impeachment of award. Evidence. Arbitrator incompetent witness.*

It is not competent to impeach an award by the testimony of an arbitrator who executed the same. *Ib.*

ARGUMENT.

IMPROPER.

The language of the prosecuting attorney in his closing argument on a trial for murder, to the effect that he would show how people regarded the accused, and that policemen, knowing his past, did not try to stop him after the killing, did not constitute reversible error, though no evidence was introduced as to the character of accused. *Schrader* v. *State*, 593.

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ASSIGNEE.

See ESTOPPEL, 3.

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ASSIGNMENTS FOR BENEFIT OF CREDITORS.

1. SECURED CREDITOR. *Right to dividend.*

Under a non-preferential assignment for the benefit of creditors, providing for the payment of liabilities ratably, a creditor who holds collateral security for his debt is not entitled to dividends upon the face of his claim without crediting the value of the collaterals. *Union, etc., Bank* v. *Duncan*, 467.

2. TAXATION. *Insolvent bank. Duty of assignee. Code* 1892, § 3755.

Under Code 1892, § 3755, providing that every taxpayer, when requested, shall make out and deliver to the assessor a true list of his taxable personal property, held in his own right or as trustee or otherwise, on February 1st preceding, the notes and solvent credits of an insolvent bank, passed to an assignee by a general assignment before February 1st in any year, are taxable in the hands of the assignee and he should render them to the assessor. *Gerard* v. *Duncan*, 731.

3. SAME. *Double taxation.*

The fact that the creditors of an insolvent bank, whose solvent credits are taxed in the hands of an assignee, have the debts due them from the bank assessed against them does not constitute double taxation. *Ib.*

ATTACHMENTS.

1. GARNISHMENT. *Change of venue. Code* 1892, § 2147.

A defendant in attachment cannot avail of the right to a change of venue given by Code 1892, § 2147, to garnishees who reside out of the county and whose answers are controverted. *McCloud* v. *McCullers*, 20.

2. WRIT. *Defects. Service. Dismissal. Amendment.*

Defects in proceedings by which an attachment writ was sued out and served will not justify the dismissal of the suit on the debt, nor deprive the plaintiff of the right to amend and sue out alias process. *Foote* v. *Hall Commission Co.*, 445.

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ATTEMPTS.

1. CRIMINAL LAW. *Conviction of under indictment for the crime. Code* 1892, § 1426. *Rape.*

Code 1892, § 1426, providing that on an indictment for any offense the jury may convict the defendant of an attempt to commit it, is applicable to the crime of rape, and a defendant's instruction excepting it therefrom was properly refused. *Horton* v. *State,* 473.

2. SAME. *Subornation of perjury. Code* 1892, § 1246. *Indictment. Materiality.*

An indictment for an attempt to suborn a witness to commit perjury, under Code 1892, § 1246, is demurrable if it fail to show the materialty of the testimony corruptly sought. *State* v. *Booker,* 187.

ATTORNEY AND CLIENT.

1. COMPROMISE OF LITIGATION. *Compensation.*

Where a controversy touching the probation of claims against the estate of a decedent was referred to auditors whose report, after much evidence had been introduced by the parties, allowed some of the claims and disallowed others, and the parties mutually agreed to and did acquiesce and consent to a confirmation of the report and payment was made accordingly, there was a compromise of the litigation within the meaning of a contract between one of the parties and his attorney providing for a lesser fee in case the litigation should be compromised than the sum agreed to be paid if it were prosecuted to judgment. *Clifton* v. *Clark,* 795.

2. SAME. *Chancellor's finding. Equitable compensation.*

Where under the terms of a contract between a litigant and his attorney the fee of the attorney was to be equitably diminished from the maximum sum agreed to be paid should the suit be compromised, the findings of the chancellor as to what was equitable in the premises will not be reversed because the client settled more favorably with other attorneys for like services. *Ib.*

3. LIEN. *Extent.*

An attorney has a lien on the funds of his client for services rendered in the proceedings by which the money was collected, but not for services rendered in other cases. *Halsell* v. *Turner,* 432.

4. SAME. *Exemptions. Wages. Code* 1892, § 1963, *par.* 10*a.*

Money collected by an attorney on a claim due his client for wages, exempt from execution or garnishment under Code 1892, § 1963, par. tenth (a), is not exempt from the attorney's lien. *Ib.*

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ATTORNEY IN FACT.

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Allen v. *Alliance Trust Co.*, 319.

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Halsell v. *Turner*, 432.

See SUPERVISORS, BOARD OF, 1.

Hinton v. *Perry County*, 536.

AUTREFOIS CONVICT.

1. CRIMINAL LAW. *Constituent crime. Misdemeanor. Felony.*

The conviction of a defendant by a justice of the peace of a misdemeanor is not a bar to an indictment for a felony of which the misdemeanor is a constituent; such a conviction for an assault and battery does not bar an indictment for an assault and battery with intent to kill and murder predicated of the same acts. *Huffman* v. *State*, 479.

2. SAME. *Code* 1892, § 1340. *Constitutional law. Constitution* 1890, *sec.* 22. *Jeopardy.*

Code 1892, § 1340, providing that the conviction of a defendant by a justice of the peace for a misdemeanor shall not bar a prosecution for a felony in the same matter, is not violative of Constitution 1890, sec. 22, declaring that a person shall not be twice placed in jeopardy for the same offense. *Ib.*

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BAIL.

HABEAS CORPUS. *Pending appeal. Murder. Extradition. Code* 1892, § 2227.

Under Code 1892, § 2227, denying the benefits of the writ of *habeas corpus* to one charged with an offense committed in any other part of the United States, and who, agreeably to the constitution of the United States or the laws of the state, ought to be delivered up to the executive power of the state or territory where the offense is charged to have been committed, a person indicted for murder in another state—an offense not there bailable—and who has been arrested in this state on a warrant issued by the governor upon requisition from the chief executive of such other state, is not entitled to bail pending his appeal to the supreme court from a judgment remanding him to custody in a *habeas corpus* proceeding based upon the ground that he is not a fugitive from justice and was not in such other state when the crime was committed. *Ex Parte Wall*, 783.

BAILMENTS.

ACTION BY BAILOR. *Evidence. Bookkeeping bad.*

A bailor in an action against a bailee for the value of the subject of the bailment is not precluded from making out his case by other competent evidence because he cannot make an intelligent statement of his losses from his own badly kept account books. *Knoop* v. *Columbus, etc., Co.*, 239.

BANKRUPTCY.

1. TRUSTEE. *Suits by. Fraudulent conveyance.*

A trustee in bankruptcy, as the representative of the creditors of the estate, may maintain a suit in equity to set aside fraudulent deeds made by the bankrupt, and subject the property conveyed to his debts. *Thompson* v. *Bank*, 54.

2. SAME. *Partnership. Dissolution. Consent of creditors.*

Where, on the dissolution of a partnership, the retiring partner and all the creditors consenting thereto, the title to firm property was transferred to the partner who was to continue the business, and three months thereafter the continuing partner made disposition thereof and was adjudged a bankrupt, the right of his trustee in bankruptcy to sue for the property so disposed of by him cannot be defeated on the claim that the property was partnership property. *Ib.*

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BANKRUPTCY—*Continued.*

3. TRUSTEE. *Mere preference. Bankrupt act of* 1898.

Under the bankrupt act of 1898, sec. 60, subd. "a," of which defines a preference within the contemplation of the law as a transfer of any of the bankrupt's property, the effect of which will be to enable any creditor to obtain a greater percentage of his debt than other creditors of the same class, and sec. 3 of the same, which provides that a transfer by a person, while insolvent, of any portion of his property with intent to prefer a creditor over other creditors, shall be an act of bankruptcy, a mere preference does not amount to an act of bankruptcy; there must be also an intent to prefer. *Thompson* v. *Bank*, 54.

4. SAME. *Trustee's suit. Recovery of property. Necessary proof. Defendant's knowledge.*

Under Bankr. Act, July 1, 1898, sec. 57, subd. "g," providing that the claims of creditors who have received preferences shall not be allowed unless the creditors surrender their preferences, and sec. 60, subd. "b," declaring that if a bankrupt has given a preference within four months, etc., and the person receiving it shall have reasonable cause to believe that it was intended to give a preference, the trustee may recover the property on proof that the transfer was intended as a preference by the bankrupt, and also that the receiving creditor had reasonable cause to believe that it was so intended. *Ib.*

5. SAME. *Sufficiency of pleading.*

Where the bill by a trustee in bankruptcy to recover property transferred by the bankrupt alleged that the conveyance was made for the purpose of preferring the transferee, and that the transferee had knowledge of all the facts at the time of the preference, it stated a cause of action against the transferee. *Ib.*

6. SAME. *Demurrer erroneously sustained. No affirmance on facts.*

Where, in a suit by a trustee in bankruptcy to set aside a transfer of property made by the bankrupt, a demurrer was erroneously sustained to the bill and the same dismissed after evidence had been taken, the court on appeal will not affirm the judgment on the theory that the decision was correct, although made on the wrong ground, there having been no decision on the evidence, but only on the pleadings. *Ib.*

BANKS AND BANKING.

COLLECTIONS. *Unlimited indorsement. Insolvency. Right to proceeds.*

A bank receiving checks drawn on it from its correspondent bank, payable to a third bank which had indorsed them in blank, has the right,

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BANKS AND BANKING—*Continued.*

being ignorant of its correspondent's insolvency and of the fact that it held the checks only for collection, to credit the sums drawn for to its correspondent from whom it received the checks in accordance with the course of uniform dealings between them, and is not liable to the payee in the checks who had sent them for collection to the correspondent bank, since the payee bank by its unlimited indorsement had divested itself of ownership of the checks. *Continental, etc., Bank* v. *First National Bank,* 103.

BASTARDS.

CUSTODY. *Putative father.*

The mother of a bastard child being dead, the putative father, in the absence of any showing of his unfitness, is entitled, if able to take care of and support it, to the custody of the child, as against its maternal uncle. *Aycock* v. *Hampton,* 204.

See WITNESSES, 3.

Ivy v. *State,* 264.

BOARD OF LIQUIDATING LEVEE COMMISSIONERS.

See LIQUIDATING LEVEE BOARD.

Mitchell v. *Bond,* 72.

BOARD OF SUPERVISORS.

1. COUNTIES. *Injunctions. Dissolution. Damages. Solicitor's fees.*

Solicitors' fees are allowable as damages upon the dissolution of an injunction restraining the board of supervisors of a county from removing a county seat. *Hinton* v. *Perry County,* 536.

2. BOARD OF SUPERVISORS. *Judgments. Collateral attack.*

Defects in the proceedings and judgments of a board of supervisors, not jurisdictional in their nature, are unavailing in a collateral proceeding to defeat the action of the board. *Ib.*

3. SAME. *Limited jurisdiction. What record to show.*

In matters in which the board of supervisors have limited jurisdiction its record must show jurisdictional facts, but need not set out the evidence thereof. *Ib.*

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BOARD OF SUPERVISORS—*Continued.*

4. BOARD OF SUPERVISORS. *Fraud. Corruption.*

Any judgment of the board of supervisors may be attacked on the ground of fraud or corruption when seasonably set up and pleaded. *Hinton* v. *Perry County*, 536.

5. POSTAGE. *Chancery clerk. Board of supervisors. Code* 1892, § 296.

It is the duty of the board of supervisors, under Code 1892, § 296, requiring it to furnish the county officers with necessary stationery, furniture, and "all other necessary articles," to furnish the necessary postage to be used in the official business of the clerk of the chancery court. *Downing* v. *Hinds County*, 29.

BOOKKEEPING.

See BAILMENTS.

Knoop v. *Columbus, etc., Co.*, 239.

BURDEN OF PROOF.

FREIGHT CHARGES. *Common carrier. Approval of rates.*

The burden is not on the plaintiff to show, in a suit against a railroad for breach of contract to transport freight at a specified rate, that the contracted rate had been filed with the Interstate Commerce Commission or approved by the State Railroad Commission, as required by the Interstate Commerce Act, and Code 1892, § 4292. *Laurel Cotton Mills* v. *Gulf, etc., R. R. Co.*, 339.

CARRIER, COMMON.

1. LIABILITY FOR FREIGHT. *Notice of arrival.*

The liability of a common carrier of goods as carrier continues until a reasonable time for their removal has elapsed after the carrier gives the consignee notice of their arrival at the point to which they were shipped. *Gulf, etc., R. R. Co.* v. *Horton*, 490.

2. SAME. *Custom not to give notice.*

A custom of a common carrier not to give notice to the consignee of the arrival of goods will not terminate its liability as carrier, but the same will continue until such notice is given. *Ib.*

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CHANCERY CLERK.

See SUPERVISORS, BOARD OF, 5.

Downing v. *Hinds County*, 29.

CHANCERY PLEADING AND PRACTICE.

1. CROSS-BILL. *Prayer for general relief. Reformation granted.*

Where a cross-bill based on a mistake in a deed concluded with a prayer for general relief, the chancellor should have decreed that the cross-complainants were, as to the cross-defendants, the owners of the property in question, where the proof showed such to be the case, although the cross-bill did not seek the reformation of the deed. *Moore* v. *Crump*, 612.

2. FRAUDULENT CONVEYANCE. *Void description. Equity between grantor and grantee. Creditor's right. Cancellation.*

A creditor's bill to set aside a fraudulent conveyance made by his debtor should not be dismissed, or relief narrowed, because the land is so defectively described in the deed as to render it void upon its face, since such a deed creates in the grantee as against the grantor an equity in the land intended to be conveyed which the creditor is entitled to have cancelled. *Levy* v. *Royston*, 15.

3. SAME. *Second deed. Procedure. Right to assail.*

Where, in a creditor's suit to cancel for fraud a deed made by his debtor, the court after hearing the cause announced its conclusion that the deed was void because of a defective description of the land, and, before final decree entered, the debtor executed a second deed perfecting the description, the cause should, on complainant's application, be remanded to the rules and complainant allowed to file a supplemental bill assailing the second deed. *Ib.*

4. FRAUDS. *Facts must be pleaded.*

A bill in equity, to set aside a sale under a deed of trust on the ground of fraud, is demurrable, if it fail to state the facts of which the charge of fraud is predicated. *Weir* v. *Jones*, 602.

5. SAME. *Trust Deed. Foreclosure. Notice.*

A bill in equity to set aside a sale of lands is demurrable, if it admit that the lands were regularly sold, under a valid deed of trust, for the collection of a just and past due debt, and that complainants knew of the sale in ample time to have enjoined the same on any valid objection, although it charge that the sale was the result of a conspiracy between the trustee and the holder of a junior mortgage on the land, and that the beneficiary in the deed of trust did not desire to foreclose the deed when the sale was made. *Ib.*

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CHANCERY PLEADING AND PRACTICE—*Continued.*

6. PROCESS. *Injunction writ. Service. Pro confesso. Code* 1892, §§ 549, 3414, 3418.

The service on a defendant of an injunction writ, granted on a bill in equity seeking to restrain defendant from committing trespasses, and demanding damages and the statutory penalty for cutting trees, the same not being a summons and not containing the requisites of one (Code 1892, §§ 3414, 3418), does not authorize the granting of a *pro confesso* to the bill (Code 1892, § 549), although the writ, naming no return-day, commanded the defendant to appear and answer the bill. *Sheffield* v. *Friedberg,* 188.

7. RES ADJUDICATA.

A complainant in an equity suit cannot escape a plea of *res adjudicata* by bringing the suit in the name of another, not a party to the previous suit, for his use. *Hartman* v. *Pickering,* 427.

8. SAME. *Pro confesso.*

A final decree of the chancery court predicated of a *pro confesso* just as effectually adjudicates the rights of the parties as any other final decree. *Ib.*

9. SAME. *Concrete case.*

A suit in equity enjoining an action of ejectment and seeking a reformation of deeds and a sale of the lands to satisfy certain liens, under a defective foreclosure of which the complainant acquired an interest in the lands, to which a tenant of the complainant, an assignee of the lease, claiming a conditional right to become a purchaser at the end of the lease, is made a defendant and who is charged to have colluded with the plaintiff in ejectment in order to defraud the complainant, and which culminates in a decree in complainant's favor directing the sale of the lands, subject to certain adjudicated rights of the tenant, will preclude the tenant from asserting any greater rights than those awarded him by the decree. *Ib.*

10. SUPREME COURT PRACTICE. *Transcript. Exhibits to bill in equity. Recitals.*

Where an original bill in equity made a deed from a substituted trustee in a deed of trust an exhibit thereto and a part thereof, and the deed so exhibited made the instrument appointing the substituted trustee a part of itself, and the same was copied into the transcript, it became on appeal a part of the record in the supreme court, although an amended bill was filed in the case which simply referred to the deed and did not make it an exhibit to the bill as amended. *Weir* v. *Jones,* 610.

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CHANCERY PLEADING AND PRACTICE—*Continued.*

11. SUPREME COURT PRACTICE. *Res adjudicata.*

Where, in a suit to set aside a trust deed, the court, on appeal, in its opinion referred to an instrument appointing a substituted trustee, but no question as to the validity of the appointment was passed on, there was no ground for striking such reference from the opinion, on the idea that it might preclude complainant on the next trial from attacking the validity of the appointment. *Weir* v. *Jones*, 610.

CHARACTER.

EVIDENCE.

On a trial for rape it is error to refuse to admit testimony on behalf of defendant of his general reputation for peace or violence. *Horton* v. *State*, 473.

CHECKS.

BANKS AND BANKING. *Collections. Unlimited indorsement. Insolvency. Right to proceeds.*

A bank receiving checks drawn on it from its correspondent bank, payable to a third bank which had indorsed them in blank, has the right, being ignorant of its correspondent's insolvency and of the fact that it held the checks only for collection, to credit the sums drawn for to its correspondent from whom it received the checks in accordance with the course of uniform dealings between them, and is not liable to the payee in the checks who had sent them for collection to the correspondent bank, since the payee bank by its unlimited indorsement had divested itself of ownership of the checks. *Continental etc. Bank* v. *First National Bank*, 103.

CHEMICAL EXPERIMENTS.

See CRIMINAL LAW AND PROCEDURE, 9.

Boyd v. *State*, 414.

CIRCUIT COURTS.

1. JUSTICE OF THE PEACE. *Appeal. Notice.*

Upon appeal from the judgment of a justice of the peace to the circuit court it is unnecessary to give notice of the appeal to the adverse party. *Rowe* v. *Cannon*, 101.

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CIRCUIT COURTS—*Continued.*

2. JUSTICE OF THE PEACE. *Code* 1892, §§ 82, 84.

The execution of the appeal bond in such case, as required by Code 1892, § 82, and the transmission of the record to the circuit court, as required by Code 1892, § 84, has the effect of continuing the pendency of the suit. *Rowe* v. *Cannon,* 101.

3. SAME. *Code* 1892, § 3417.

Code 1892, § 3417, providing for the issuance of a summons upon the institution of a suit in the circuit court, has no application to a case appealed from a justice of the peace. *Ib.*

4. EXTENSION OF MUNICIPAL BOUNDARIES. *Appeal. Issue. Time.*

The question whether a contemplated extension or contraction of the limits of a municipality be or be not reasonable, which is to be tried on an issue to be made up on an appeal to the circuit court from an ordinance proposing the same under Code 1892, §§ 2912a, 2913, Amended Laws 1902, p. 154, authorizing such procedure and appeal and providing for such issue, is to be determined by the facts and circumstances at the time of the adoption of the ordinance. *Jackson* v. *Whiting,* 163.

5. SAME. *Striking issues from files.*

Where a municipality, upon appeal from its ordinance proposing the annexation of adjacent territory, tendered in the circuit court the statutory issue, averring that the annexation proposed by its ordinance was reasonable, it was error to strike the issue so tendered from the files on a mere inference that the territory sought to be annexed was incorporated territory at the time the ordinance was adopted. *Ib.*

COAST.

See SEASHORE, 1, 2.

Barataria Canning Co. v. *Ott,* 737.

CODE 1871.

§ 2323. Married women. Coverture. Emancipation. Effect on statute. *Southworth* v. *Brownlow,* 405.

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CODE 1880.

1. § 956. Seashore rights. Grants by board of supervisors. *Barataria Canning Co.* v. *Ott*, 737.
2. § 1167. Married women. Coverture. Emancipation. Effect of. *Southworth* v. *Brownlow*, 405.
3. § 1190. Estate tail. Limitations of estates. *Banking Co.* v. *Field*, 646.
4. § 1203. Estate tail. Limitations of estates. *Banking Co.* v. *Field*, 646.

CODE 1892.

1. § 82. Justice of the peace. Appeals. Notice. *Rowe* v. *Cannon*, 101.
2. § 84. Justice of the peace. Appeals. Notice. *Rowe* v. *Cannon*, 101.
3. § 98. Arbitration and award. *Mississippi Cotton Oil Co.* v. *Buster*, 91.
4. § 104. Arbitration and award. *Mississippi Cotton Oil Co.* v. *Buster*, 91.
5. § 296. Postage. Chancery clerk. Board of supervisors. *Downing* v. *Hinds County*, 29.
6. § 549. Pro confesso. Process. Injunction writ. *Sheffield* v. *Friedberg*, 188.
7. § 717. Amendments. Landlord and tenant. *Bowles* v. *Dean*, 376.
8. § 746. Statute of jeofails. *Yazoo, etc., R. R. Co.* v. *Schraag*, 125.
9. § 1149. Murder. Definition. Instruction. *Ivy* v. *State*, 264.
10. § 1246. Attempt to suborn a witness. *State* v. *Booker*, 187.
11. § 1301. Telegraph employes. Disclosing message. Penalty not on company. *Corke* v. *Western etc. Tel. Co.*, 380.
12. § 1340. Jeopardy. *Huffman* v. *State*, 479.
13. § 1551. Exempt homestead. Widow's rights. *Martin* v. *Martin*, 553.
14. § 1553. Exempt homestead. Widow's rights. *Martin* v. *Martin*, 553.
15. § 1740. Estates of decedents. Witnesses. Evidence. *Steen* v. *Kirkpatrick*, 63.
16. § 1740. Witnesses. Claims against estate of a decedent. *Moore* v. *Crump*, 612.
17. § 1792. Justice of the peace. Loss of records. Suit on judgment. *Wise* v. *Thread*, 200.
18. § 1838. Probate of claims. Express trust. *Gordon* v. *McDougall*, 715.
19. § 1925. Guardians. Foreign appointment. Rights. *Boyle* v. *Griffin*, 41.
20. § 1932. Estate of decedent. Probation of claims. *Foster* v. *Shaffer*, 197.
21. § 1933. Probate of claims. Express trust. *Gordon* v. *McDougall*, 715.
22. § 1957. Estate of decedents. Funeral expenses. Attorney's fees. *Dobbs* v. *Chandler*, 372.
23. § 1963. Par. 10a. Exemption of wages. Attorney's lien. *Halsell* v. *Turner*, 432.

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Code 1892.

CODE 1892—*Continued.*

24. § 1965. Estate of decedents. Last illness. Nursing. Life insurance exemption. *Dobbs* v. *Chandler*, 372.
25. § 2147. Attachment. Garnishment. Change of venue. *McCloud* v. *McCullers*, 20.
26. § 2211. Guardians. Foreign. Rights of. *Boyle* v. *Griffin*, 41.
27. § 2227. Habeas corpus. Bail. Extradition. *Ex parte Wall*, 783.
28. § 2289. Married woman. Emancipation. *Southworth* v. *Brownlow*, 405.
29. § 2389. Juries. Special venire. *Buchanan* v. *State*, 332.
30. § 2395. Justice of the peace. Suit on judgment. Venue. *Wise* v. *Thread*, 200.
31. § 2413. Justice of the peace. Judgment. Enrollment. *Wise* v. *Thread*, 200.
32. § 2434. Statute of limitations. Possession of land. *Anderson* v. *Moore*, 400.
33. § 2436. Estates tail. Limitations over. *Banking Co.* v. *Field*, 646.
34. § 2448. Estates tail. Limitations over. *Banking Co.* v. *Field*, 646.
35. § 2544. Landlord and tenant. Summary proceeding. *Wilson* v. *Wood*, 728.
36. § 2547. Landlord and tenant. Summary proceeding. *Wilson* v. *Wood*, 728.
37. § 2547. Landlord and tenant. Tenant holding over. *Bowles* v. *Dean*, 376.
38. § 2548. Landlord and tenant. Tenant holding over. *Bowles* v. *Dean*, 376.
39. § 2552. Landlord and tenant. Counter affidavit. *Bowles* v. *Dean*, 376.
40. § 2730. Scrambling possession. *Mitchell* v. *Bond*, 72.
41. § 2730. Adverse possession. *Moore* v. *Crump*, 612.
42. § 2731. Scrambling possession. *Mitchell* v. *Bond*, 72.
43. § 2731. Adverse possession. *Moore* v. *Crump*, 612.
44. § 2734. Scrambling possession. *Mitchell* v. *Bond*, 72.
45. § 2734. Adverse possession. *Moore* v. *Crump*, 612.
46. § 2735. Tax titles. Statute of limitations. *Mitchell* v. *Bond*, 72.
47. § 2737. Statute applied. *Fowlkes* v. *Lea*, 509.
48. § 2752. Statute of limitations. Appeals. *Chambliss* v. *Wood*, 209.
49. § 2921. Constitutional. *Jackson* v. *Whiting*, 163.
50. § 2947. Municipalities. Streets. Lights. Shade trees. *Hazlehurst* v. *Mayes*, 7.
51. § 3010. Compilation of municipal ordinances. *Chrisman* v. *Jackson*, 787.
52. § 3080. Board of supervisors. Seashore. *Barataria Canning Co.* v. *Ott*, 737.
53. § 3101. Partition. Jurisdiction in as extended. *Walker* v. *Williams*, 392.
54. § 3119. Partition. Solicitor's fees in. *Walker* v. *Williams*, 392.

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CODE 1892—*Continued.*

55. § 3414. Pro confesso. Process. Injunction writ. *Sheffield* v. *Friedberg*, 188.
56. § 3417. Appeals from justices of the peace. No application to. *Rowe* v. *Canune*, 101.
57. § 3418. Pro confesso. Process. Injunction writ. *Sheffield* v. *Friedberg*, 188.
58. § 3549. Railroads. Passenger depots. Backing trains. *Yazoo etc. R. R. Co.* v. *Metcalf*, 242.
59. § 3555. Railroads. Highway crossings. *Gulf etc. R. R. Co.* v. *Sneed*, 252.
60. § 3749a. Taxation. State lands. Date of liability for accruing taxes. *Wildberger* v. *Shaw*, 442.
61. § 3801. Taxation. State land. Date of liability for accruing taxes. *Wildberger* v. *Shaw*, 432.
62. § 4225. (a) Debt, default, or miscarriage of another. *Wear etc. Co.* v. *Kelly*, 236.
63. § 4225. (b) Consideration of marriage. Contemplation thereof. *Steen* v. *Kirkpatrick*, 63.
64. § 4225. (c) Sale of lands. *Steen* v. *Kirkpatrick*, 63.
65. § 4225. (d) Agreement not to be performed in one year. *Steen* v. *Kirkpatrick*, 63.
66. § 4230. Statute of frauds. Trust. *Moore* v. *Crump*, 612.
67. § 4287. Railroads. Freights. Discrimination. Contracts. *Laurel etc. Mills* v. *Gulf etc. R. R. Co.*, 339.
68. § 4290. Railroads. Freights. Discrimination. Contracts. *Laurel etc. Mills* v. *Gulf, etc., R. R. Co.*, 339.
69. § 4292. Railroads. Freights. Discrimination. Contracts. *Laurel etc. Mills* v. *Gulf, etc., R. R. Co.*, 339.
70. § 4403. Municipal surveys. Maps. Penalty. *Wellborn* v. *Muller*, 726.

COMPROMISE.

1. LITIGATION. *Attorney and client. Compensation.*

Where a controversy touching the probation of claims against the estate of a decedent was referred to auditors whose report, after much evidence had been introduced by the parties, allowed some of the claims and disallowed others, and the parties mutually agreed to and did acquiesce and consent to a confirmation of the report and payment was made accordingly, there was a compromise of the litigation within the meaning of a contract between one of the parties and his attorney providing for a lesser fee in case the litigation should be compromised than the sum agreed to be paid if it were prosecuted to judgment. *Clifton* v. *Clark*, 795.

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COMPROMISE—*Continued.*

2. LITIGATION. *Chancellor's finding. Equitable compensation.*

Where under the terms of a contract between a litigant and his attorney the fee of the attorney was to be equitably diminished from the maximum sum agreed to be paid should the suit be compromised, the findings of the chancellor as to what was equitable in the premises will not be reversed because the client settled more favorably with other attorneys for like services. *Clifton* v. *Clark*, 795.

3. CONTRACT. *Settlement of suit.*

An intelligent, competent litigant, fully informed and advised by able counsel, who, after time for reflection, makes a settlement of pending litigation, there being no concealment on the part of any one, by which he receives money, is bound by the settlement and precluded from further prosecution of the suit. *Banking Co.* v. *Field*, 646.

CONFUSION OF GOODS.

REPLEVIN. *Waiver of landlord's lien. Commingling goods. Estoppel.*

A landlord who has waived his lien for rent in favor of one who advances supplies to a tenant on the security of a deed of trust on his cotton crop, is, after receiving cotton to the amount of four bales from the tenant and mingling the same with his own, estopped to deny that a bale of cotton seized by the trustee was produced by the tenant on the demized premises. *Alexander* v. *Zeigler*, 560.

CONSIDERATION.

CONSIDERATION.

For difference between a contract made in consideration of marriage and one made in contemplation of marriage,

See STATUTE OF FRAUDS.

Steen v. *Kirkpatrick*, 63.

CONSTITUENT CRIME.

1. CRIMINAL LAW. *Autrefois convict. Misdemeanor. Felony.*

The conviction of a defendant by a justice of the peace of a misdemeanor is not a bar to an indictment for a felony of which the misdemeanor is a constituent; such a conviction for an assault and battery does not bar an indictment for an assault and battery with intent to kill and murder predicated of the same acts. *Huffman* v. *State*, 479.

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CONSTITUENT CRIME—*Continued.*

2. CRIMINAL LAW. *Code* 1892, § 1340. *Constitutional law. Constitution* 1890, *sec.* 22. *Jeopardy.*

Code 1892, § 1340, providing that the conviction of a defendant by a justice of the peace for a misdemeanor shall not bar a prosecution for a felony in the same matter, is not violative of Constitution 1890, sec. 22, declaring that a person shall not be twice placed in jeopardy for the same offense. *Huffman* v. *State*, 479.

CONSTITUTIONAL LAW.

1. COUNTY SEATS. *Seat of justice of county judicial district. Legislative power.*

The legislature has all political power not denied it by the state or national constitution. *Hinton* v. *Perry County*, 536.

2. SAME. *Constitution* 1890, *sec.* 260. *Laws* 1902, *p.* 172.

Laws 1902, p. 172, providing for an election to determine the question of the removal of the seat of justice of the first judicial district of Perry county, is not violative of nor affected by Constitution 1890, sec. 260, prohibiting the change of the boundaries of county judicial districts except as therein specified. *Ib.*

3. SAME.

Constitution 1890, sec. 259, providing that no county seat shall be removed unless authorized by two-thirds of the electors voting therefor, but that where the removal is towards the center of the county it may be made if a majority of the electors voting shall vote therefor, most probably has no application to an act, like Laws 1902, p. 172, providing for an election to determine the question of removal of a seat of justice of one of the judicial districts of a county having two such districts; but, if applicable, it requires a two-thirds vote, unless the removal be towards the center of the district, in which case a majority vote is sufficient. *Ib.*

4. SAME. *Constitution* 1890, *secs.* 152, 259, 260. *New counties. Judicial districts. County seats.*

The subject of legislative power to create new counties, divide counties into judicial districts, and remove seats of justice of such districts discussed. *Ib.*

5. JEOPARDY. *Code* 1892, § 1340. *Constitutional law. Constitution* 1890, *sec.* 22.

Code 1892, § 1340, providing that the conviction of a defendant by a justice of the peace for a misdemeanor shall not bar a prosecution

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Constitutional law.

CONSTITUTIONAL LAW—*Continued.*

for a felony in the same matter, is not violative of Constitution 1890, sec. 22, declaring that a person shall not be twice placed in jeopardy for the same offense. *Huffman* v. *State,* 479.

6. MUNICIPALITIES. *Code* 1892, § 2945. *Closing streets. Compensation. Abutting property owners.*

Code 1892, § 2945, empowering municipalities to close and vacate streets, does not dispense with the necessity of compensating abutting property owners. *Laurel* v. *Rowell,* 435.

7. SAME. *Constitutional law. Private property. Public use. Constitution* 1890, *sec.* 17.

Where a municipality closes and vacates an established street it deprives the owners of abutting lots of a right, which is property, and which cannot be taken except on due compensation being first made, under Constitution 1890, sec. 17, regulating the taking of private property for public use. *Ib.*

8. SAME. *Incorporation of. Governor.*

Code 1892, § 2921, Amended Laws 1898, p. 50, authorizing the governor to pass upon and approve applications for the incorporation of cities, towns, and villages not previously incorporated, is constitutional and does not submit to the executive questions belonging to the legislative department of the government, under Constitution 1890, sec. 88, providing that the legislature shall pass general laws for the incorporation of municipalities. *Jackson* v. *Whiting,* 163.

9. RAILROADS. *Master and servant. Incompetent employes. Personal injuries. Common law liability. Ch.* 66, *Laws* 1898; *ch.* 87, *Laws* 1896.

The decision (*Ballard* v. *Cotton Oil Co.,* 81 Miss., 507) declaring ch. 66, Laws 1898, and ch. 87, Laws 1896, unconstitutional as class legislation, because the modification of the fellow-servant rule therein contained was applied to all corporations without reference to the use of dangerous agencies in their business, does not relieve a railroad company of its common law liability for injuries causing the death of an employe when such injuries resulted from its employment, without due care, of other servants who were incompetent. *Yazoo etc. R. R. Co.* v. *Schraag,* 125.

10. TAXATION. *Constitution* 1890, *sec.* 112. *Privilege tax. Lumber business. Exemption. Non-exporter. Interstate commerce. Constitution of the United States, art.* 1, *sec.* 8, *clause* 3. *Laws* 1900, *p.* 43, *ch.* 43, *sec.* 8.

The eighth section of the act of March 9, 1900 (Laws 1900, p. 43, ch. 43, sec. 8), purporting to impose a privilege tax "on each land timber

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CONSTITUTIONAL LAW—*Continued.*

mill company," etc., but excepting therefrom sawmill operators who do not ship timber or lumber out of the state, is unconstitutional, in that it violates:

(*a*) Constitution 1890, sec. 112, declaring that taxation shall be uniform and equal; and

(*b*) Constitution of the United States, art. 1, sec. 8, par. 3, giving congress power to regulate commerce between the states, since it seeks to impose a tax on interstate commerce. *Adams* v. *Mississippi Lumber Co.*, 23.

CONSTITUTION 1890.

1. § 17. Municipalities. Closing streets. Compensation to abutters. *Laurel* v. *Rowell*, 435.
2. § 22. Jeopardy. Conviction of constituent crime not. *Huffman* v. *State*, 479.
3. § 88. Incorporation of municipalities. Governor. *Jackson* v. *Whiting*, 163.
4. § 94. Emancipation of married women. Effect. *Southworth* v. *Brownlow*, 405.
5. § 112. Taxation. Privilege tax within. *Adams* v. *Mississippi Lumber Co.*, 23.
6. § 152. Judicial districts. *Hinton* v. *Perry County*, 536.
7. § 193. Fellow servant rule. Railroads. *Yazoo etc. R. R. Co.* v. *Schraag*, 125.
8. § 193. Fellow servant rule. Railroads. *Illinois etc. R. R. Co.* v. *Abrams*, 456.
9. § 193. Fellow servant rule. Railroads. *Southern Ry. Co.* v. *Cheaves*, 565.
10. § 259. County seats. Removal. *Hinton* v. *Perry County*, 536.
11. § 260. County boundaries. Change of. *Hinton* v. *Perry County*, 536.

CONSTITUTION OF THE UNITED STATES.

Art. 1, sec. 8, par. 3. Interstate commerce.

Adams v. *Mississippi Lumber Co.*, 23.

CONSTRUCTION.

See CONTRACTS, 18, 19.

Hardie-Tynes, etc., Co. v. *Glen-Allen Oil Mill*, 259.

See DEEDS, 8, 9.

Barataria etc. Co. v. *Ott*, 737.

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CONTRACTS.

1. AMBIGUITIES. *Land. Description. Name of tract.*

A contract purporting to obligate the owner to convey a tract of land by name (as the "Phil Allen place") and naming the number of acres therein, does not contain a patent ambiguity, and it is valid where by extrinsic evidence it can with certainty be shown what lands were known by the name. *Raines* v. *Baird*, 807.

2. COMPROMISE. *Settlement of litigation.*

An intelligent, competent litigant, fully informed and advised by able counsel, who, after time for reflection, makes a settlement of pending litigation, there being no concealment on the part of any one, by which he receives money, is bound by the settlement and precluded from further prosecution of the suit. *Banking Co.* v. *Field*, 646. *See Clifton* v. *Clark*, 795.

3. COUNTIES. *District attorney. Chemical analysis of stomach. Criminal procedure.*

A district attorney, in the absence of statutory authority, cannot by contract bind a county to pay for the chemical analysis of the stomach of a deceased person supposed to have been poisoned, although the analysis be a necessary aid to the enforcement of the criminal law. *Jones* v. *Sunflower County*, 98.

4. INFANTS. *Misrepresentation of age. Estoppel. Mortgage. Necessaries.*

Where a borrower obtained a loan of money on the faith of his representation that he was an adult, he cannot defeat a mortgage given to secure the loan because of his infancy at the time, especially where the money was used by him in the purchase of necessaries. *Ostrander* v. *Quin*, 230.

5. INTERSTATE COMMERCE. *Interstate shipments. Agreement as to rates. Discrimination. Code* 1892, §§ 4287, 4290.

A contract by a railroad company to maintain rates from a factory, not exceeding to competitive points the rates from other factory towns, is not on its face void for discrimination, under the Interstate Commerce Act of February 4, 1887, 24 Statutes at Large, 379; nor Code 1892, §§ 4287, 4290. *Laurel Mills* v. *Gulf etc. R. R. Co.*, 339.

6. SAME. *Milling in transit.*

A contract by a railroad company to credit to freight charges on manufactured goods any freight received on raw material shipped to the factory, is a milling-in-transit agreement, and does not violate the statutes mentioned above. *Ib.*

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Contracts.

CONTRACTS—*Continued.*

7. INTERSTATE COMMERCE. *Code* 1892, § 4290.

The Interstate Commerce Act, sec. 6, and Code 1892, § 4292, providing for the publication by railroads of schedules of rates and forbidding deviations therefrom, do not render invalid a contract by a railroad company to charge no greater rate from a factory to competitive points than is charged from other places, nor prohibit the maintaining of a milling-in-transit agreement, in the absence of any showing that the rates fixed by the contract were different from the approved rates, or that any schedule of rates had been submitted to the commission at all before the contract was made. *Laurel Mills* v. *Gulf etc., R. R. Co.*, 339.

8. SAME. *Approval of rates. Burden of proof.*

The burden is not on the plaintiff to show, in a suit against a railroad for breach of contract to transport freight at a specified rate, that the contracted rate had been filed with the Interstate Commerce Commission or approved by the State Railroad Commission, as required by the Interstate Commerce Act, and Code 1892, § 4292. *Ib.*

9. MUNICIPALITIES. *Police power. Evasion of.*

Where a warehouse company contracted to furnish a railroad company water through conduits, but was without power to construct and maintain the same across the streets of the city in which the water was to be delivered, a subsequent agreement by which the railroad company, having such power, undertook to construct them, is not an illegal evasion of the police power of the city. *Canton* v. *Canton, etc., Warehouse Co.*, 268.

10. SAME. *Lease. Laws* 1882, *p.* 1023, *sec.* 2. *Illinois Central Railroad Company.*

The lease, executed under laws 1882, p. 1023, sec. 3, authorizing the Illinois Central Railroad Company, a foreign corporation, to lease the Chicago, St. Louis & New Orleans Railroad Company and other domestic railroad companies, invested the lessee, the foreign company, with all the power and franchises of the lessor company. *Ib.*

11. SAME. *Public road or way. Streets.*

A railroad company having power, granted by the legislature, to cross any "public road or way" has the right to cross streets as well as country roads. *Ib.*

12. SAME. *Legislative power over. Streets.*

The legislature may divest a municipality of control over its streets and authorize their use by a corporation without compensating the municipality. *Ib.*

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Contracts.

CONTRACTS—*Continued.*

13. MUNICIPALITIES. *Railroads. Conduits across streets. Right of way.*

A railroad company having the right to do all acts incidental to the maintenance of its railroad, may lay conduits under the surface of its right of way to conduct water to its buildings, although in so doing the conduits pass under the streets of a municipality. *Canton* v. *Canton, etc., Warehouse Co.*, 268.

14. SAME. *Eminent domain. Foreign corporation.*

A foreign railroad corporation, having the right to do all acts incidental to the maintenance of its railroad, will not be denied the right to lay conduits under its right of way across streets, because it has no right to exercise the power of eminent domain. *Ib.*

15. SAME. *Temporary obstruction of street. Nuisance.*

A temporary and partial obstruction of a street by a railroad company in laying conduits across it in its right of way is not a nuisance which can be enjoined. *Ib.*

16. SPECIFIC PERFORMANCE. *Land. Estate of decedent.*

Where the administrator of a decedent who contracted to convey lands is not a party to the suit, and complainant admits that the decedent was without title, specific performance of the contract should not be decreed. *Southworth* v. *Brownlow*, 405.

17. TELEGRAPH COMPANY. *Telegrams. Claim for damages. Time for filing.*

A provision in a contract for the transmission and delivery of a telegram that the telegraph company will not be liable for damages in any case, unless a written claim for damage is presented to it within sixty days after reception of the message for transmission, is reasonable and valid. *Hartzog* v. *Western, etc., Tel. Co.*, 448.

18. WRITTEN AND PRINTED PARTS. *Presumption. Construction.*

It is to be presumed that the parties intended a contract to include all of its words and phrases, and this requires that the written and printed parts of an instrument should be reconciled, if it can be done. *Hardie-Tynes, etc., Co.* v. *Glen-Allen Oil Mill*, 259.

19. SAME. *The application of the rule.*

Where a printed form provides for the delivery of an engine on "—— August, 1902, ——, unless delayed by strikes, fires, or manufacturing contingencies beyond our reasonable control," has added to it a written addendum stating, "It is understood that the above described engine will be shipped August 15, 1902; failing to do so (defendant) agrees to pay as forfeit five dollars per day for each day behind this

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CONTRACTS—*Continued.*

time," the addendum should be read with the printed form as providing for the damage and exact date of shipment subject to the clause as to strikes, etc., contained in the printed form. *Hardie-Tynes, etc., Co.* v. *Glen-Allen Oil Mill*, 259.

CONTRIBUTORY NEGLIGENCE.

1. RAILROADS. *Code* 1892, § 3549. *Backing train. Passenger depot.*

Code 1892, § 3549, regulating the backing of trains near passenger depots:

(*a*) Is not restricted in its application to any particular class of persons;

(*b*) Is a regulation intended to preserve and protect human life and limb, and should be given full scope in accordance with its plain meaning and not restricted by strained interpretation; and

(*c*) Affords protection to all persons injured by a backing train within three hundred feet of a passenger depot; the phrase "within fifty feet thereof" refers to the distance from the depot to the nearest point of the track on which the train is backing. *Yazoo, etc., R. R. Co.* v. *Metcalf*, 242.

2. SAME. *Walking between tracks. Gross negligence. Licensee.*

Where a railroad company permitted and impliedly consented to the use by the public generally of a path between two of its tracks near a passenger depot, and the plaintiff, thoroughly familiar with the surroundings, while using the path on a dark night was injured, within three hundred feet of the depot, by a rod negligently permitted to protrude from an engine backing into the depot, the plaintiff's use of the path was not, as a matter of law, such gross negligence as to take the case without the statute. *Ib.*

3. SAME. *Fires. Insurance.*

In a suit brought by the owner of property destroyed by fire for the use of insurance companies, subrogated to the owner's rights, against a railroad company for negligently causing the fire, where the testimony would support a verdict for either party, instructions for the defendant are erroneous:

(*a*) Which authorize a finding on only a part of the evidence, ignoring the balance; or

(*b*) Which assume the negligence of the owner, the evidence being conflicting on the subject; or

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Contributory negligence.

CONTRIBUTORY NEGLIGENCE—*Continued.*

(*c*) Which, propounding the plaintiff's contributory negligence as a defense, omit from the conception of it the element of proximate cause; or

(*d*) Which, propounding said defense, fail to predicate the owner's contributory negligence of knowledge that there was danger to be guarded against. *Brister* v. *Illinois, etc., R. R. Co.*, 33.

4. RAILROADS.

A railroad company which sets out a fire on its right of way so near buildings as to endanger them is negligent, if it fail to guard the fire for the entire time such danger exists. *Ib.*

5. SAME. *Custom. Contributory negligence.*

The custom of a certain train to use the main line of a track at a station does not deny it the right to use a side track, or excuse any person walking on the side track when such train is approaching, for a failure to exercise ordinary care. *Morehead* v. *Yazoo, etc., R. R. Co.*, 112.

6. SAME. *Station agent. Walking on track. Assumption of risks.*

A station agent assumes the risk incident to his acts when he goes upon a side track, rather than the space provided for pedestrians between such track and the main line, while walking to the point where he transacts business with trains. *Ib.*

7. SAME. *Engineer. Man on track. Presumption.*

The engineer of a railroad train has the right to assume that a man seen on the track, at a place where there is no difficulty in leaving it, will exercise the common instinct of self-preservation and get off the track before he is reached by the train. *Ib.*

8. TELEGRAPH COMPANY. *Night message. Delay. Exemplary damages. Actual damages.*

The sendee of a telegraphic message is not entitled, because of delay in its delivery, to recover from the telegraph company:

(*a*) Exemplary damages in the absence of gross negligence, willful wrong and wanton disregard of plaintiff's rights; nor

(*b*) Actual damages which resulted not from delay in the delivery of the message, but from plaintiff's failure to promptly answer it when it was delivered. *Western, etc., Tel. Co.* v. *Spratley*, 86.

9. OBJECTION NOT MADE ON TRIAL.

Where a defendant in an action for death resulting from a collision relied on the single ground of deceased's contributory negligence,

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CONTRIBUTORY NEGLIGENCE—*Continued.*

it cannot, on appeal, assert the insufficiency of the declaration to state a cause of action for negligence in furnishing incompetent servants. *Yazoo, etc., R. R. Co.* v. *Schraag*, 125.

CORPORATIONS.

See CONTRACTS, 9, 10, 11, 12, 13, 14, 15.

Canton v. *Canton, etc., Warehouse Co.*, 268.

COTTON SEED OIL MILLS.

See PRIVILEGE TAXES, 2.

Tate v. *Levee Commissioners*, 388.

COUNTIES.

1. CONTRACTS. *District attorney. Chemical analysis of stomach. Criminal procedure.*

A district attorney, in the absence of statutory authority, cannot by contract bind the county to pay for the chemical analysis of the stomach of a deceased person supposed to have been poisoned, although the analysis be a necessary aid to the enforcement of the criminal law. *Jones* v. *Sunflower County*, 98.

2. INJUNCTIONS. *Dissolution. Damages. Solicitor's fees.*

Solicitor's fees are allowable as damages upon the dissolution of an injunction restraining the board of supervisors of a county from removing a county seat. *Hinton* v. *Perry County*, 536.

3. BOARD OF SUPERVISORS. *Judgments. Collateral attack.*

Defects in the proceedings and judgments of a board of supervisors, not jurisdictional in their nature, are unavailing in a collateral proceeding to defeat the action of the board. *Ib.*

4. SAME. *Limited jurisdiction. What record to show.*

In matters in which the board of supervisors have limited jurisdiction its record must show jurisdictional facts, but need not set out the evidence thereof. *Ib.*

5. SAME. *Fraud. Corruption.*

Any judgment of the board of supervisors may be attacked on the ground of fraud or corruption when seasonably set up and pleaded. *Ib.*

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COUNTY SITES.

See CONSTITUTIONAL LAW, 1, 2, 3, 4.

Hinton v. *Perry County*, 536.

COVERTURE.

See HUSBAND AND WIFE, 1.

Southworth v. *Brownlow*, 405.

CREDITOR.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS, 1.

Union, etc., Bank v. *Duncan*, 467.

CRIMINAL LAW AND PROCEDURE.

1. MURDER. *Evidence.*

Where, on a prosecution for murder, there was no evidence of a conspiracy between the defendant and others, who were present at the killing, it was error to admit testimony, over defendant's objection:

(*a*) That defendant and such other persons were at the place where deceased was working on the day of the homicide, but before it occurred;

(*b*) That such other persons who were with the defendant at the time of the killing were armed with sticks which were deadly weapons, and that some of them participated in the homicide; and

(*c*) That defendant and another were at a certain store on the day before the killing, when defendant called for pistol cartridges, without permitting defendant to prove by that other how he came to be with defendant. *Pulpus* v. *State*, 49.

2. COUNTY. *Contracts. District attorney. Chemical analysis of stomach. Criminal procedure.*

A district attorney, in the absence of statutory authority, cannot by contract bind the county to pay for the chemical analysis of the stomach of a deceased person supposed to have been poisoned, although the analysis be a necessary aid to the enforcement of the criminal law. *Jones* v. *Sunflower County*, 98.

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Criminal law and procedure.

CRIMINAL LAW AND PROCEDURE—*Continued.*

3. ATTEMPT. *Subornation of perjury. Code* 1892, § 1246. *Indictment. Materiality.*

An indictment for an attempt to suborn a witness to commit perjury, under Code 1892, § 1246, is demurrable if it fail to show the materiality of the testimony corruptly sought. *State* v. *Booker*, 187.

4. MURDER. *Self-defense. Instruction. Abandonment of intent to kill.*

In a murder case it is error to give an instruction for the state denying defendant the right of self-defense if he armed himself with a deadly weapon and provoked the difficulty with intent to kill deceased, there being testimony tending to show that defendant abandoned the intent to kill before slaying the deceased and that the killing was in self-defense. *Jones* v. *State*, 194.

5. SAME. *Satisfaction of jurors' minds and consciences. Reasonable doubt.*

An instruction authorizing the conviction of a defendant if the minds and consciences of the jury are fully satisfied of his guilt is erroneous; the jury should not convict unless satisfied of a defendant's guilt beyond every reasonable doubt arising from the evidence. *Ib.*

6. SAME. *Instruction. Code* 1892, § 1149.

An instruction purporting to define murder under the statute, Code 1892, § 1149, which excludes the statutory words "without authority of law," is erroneous. *Ivy* v. *State*, 264.

SAME. *Evidence. Witness. Woman. Bastard.*

On the trial of a murder case it is competent for the state to show that a female witness for defendant is his mistress; but the paternity of her children by other men is incompetent. *Ib.*

SAME. *Self-incrimination. Advice.*

If a female witness be asked in a murder case who is the father of her illegitimate child, she should, where her answer might subject her to a criminal prosecution, be advised by the court of her right to decline to answer the question. *Ib.*

7. SAME. *Juries. Special venire. Code* 1892, § 2389.

If an impartial jury be obtained in a murder case, the defendant cannot, after conviction, predicate error of an irregularity in the drawing of a special venire, since the statutes on the subject (Code 1892, § 2389) are directory. *Buchanan* v. *State*, 332.

8. SAME. *Poisoning. Evidence. Declarations res jestae. Symptoms of suffering.*

In a prosecution for murder by poisoning the declarations of the deceased describing the symptoms of her then present sufferings are

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CRIMINAL LAW AND PROCEDURE—*Continued.*

admissible in evidence, but a narration of the symptoms of past sufferings is inadmissible. *Boyd* v. *State,* 414.

9. MURDER. *Chemical experiments.*

On a prosecution for murder by poisoning with arsenic where a physician, as a state's witness, produced several bottles which he testified contained the medicines which he had prescribed for the deceased during her last illness and showed the effects of arsenic on each of them, changing the color of the liquids, it was error to permit the state to prove that defendant, during the last illness of deceased, gave her a punctured orange, which she refused to eat, from which juice oozed of a color like one of the medicines with which arsenic had been mixed, in the absence of evidence showing that the orange contained poison or that any of the medicine taken by deceased had been changed in color. *Ib.*

10. SAME.

In a prosecution for murder by poisoning, it having been shown that deceased had been taking certain dyspepsia medicine and that the bottle containing the medicine had been kept on a shelf, in a room to which a number of persons had access, it was error to permit a witness to testify that the deceased told him, in the absence of the defendant, where she had placed the bottle of medicine, that when witness looked for it there it had been moved, and that it was afterwards found on another shelf, hidden by other bottles, having in it a liquid containing poison and of a different color from the medicine. *Ib.*

11. SAME.

Where the theory of the state was that defendant had poisoned his deceased wife in order that he might continue illicit relations with another woman, and there was no evidence whatever tending to show that such woman was in any way implicated in administering any poison to deceased, an instruction that the jury should convict if they believed beyond a reasonable doubt that defendant mixed the poison, "or procured it to be done by another," was erroneous. *Ib.*

12. SAME.

Where the theory of the state was that defendant had poisoned deceased, it was proper to permit evidence that defendant had disputed the statement of a witness at the preliminary examination to the effect that defendant had purchased poison from witness. *Ib.*

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CRIMINAL LAW AND PROCEDURE—*Continued.*

13. MURDER.

On a prosecution for murder it was error to admit evidence that accused did not testify before the justice who conducted the preliminary examinations. *Boyd* v. *State,* 414.

14. SAME.

On a prosecution for murder it was error to permit a witness for the state to testify that he had testified to the same facts at the preliminary examination. *Ib.*

15. SAME. *Dying declaration.*

In a prosecution for murder by poisoning, one of the theories of the defense being that deceased poisoned herself, a statement by the deceased, made while *in extremis* and knowing that she was about to die, in answer to an inquiry by her attending physician as to whether she had taken anything into her stomach, in these words: "The Lord is my witness, I have taken nothing except what you gave me," is admissible as a dying declaration. *Ib.*

16. SAME.

In such case it is inadmissible to prove that, just before the dying declaration was made, the physician told deceased that her husband, the defendant, was under suspicion, and that she should state whether she had so taken anything. *Ib.*

17. WITNESSES. *Contradicting one's own. Hostile witness. Entrapped into introducing. Previous statements. Materiality.*

The state cannot contradict its own witness by showing his previous statements, unless entrapped into introducing a hostile one, and in such case only by showing statements which are material to the main issue. *Dunk* v. *State,* 452.

18. SAME.

A district attorney, who calls a witness for the state without previous conference with him, cannot claim that he was entrapped and treat the witness as hostile, because his testimony is disappointing and not in harmony with what other persons had represented that it would be. *Ib.*

19. ATTEMPT. *Conviction of under indictment for the crime. Code* 1892, § 1426. *Rape.*

Code 1892, § 1426, providing that on an indictment for any offense the jury may convict the defendant of an attempt to commit it, is applicable to the crime of rape, and a defendant's instruction excepting it therefrom was properly refused. *Horton* v. *State,* 473.

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Criminal law and procedure.

CRIMINAL LAW AND PROCEDURE—*Continued.*

20. ATTEMPT. *Character.*

On a trial for rape it is error to refuse to admit testimony on behalf of defendant of his general reputation for peace or violence. *Horton* v. *State,* 473.

21. INSTRUCTIONS. *Evidence. Want of. Weight of.*

Instructions in a criminal case, as well as a civil one, should be refused if they be upon the weight of the evidence or if there be no evidence of which to predicate them. *Tidwell* v. *State,* 475.

22. SAME. *Homicide. Insanity.*

In a prosecution for homicide, a requested instruction that if the defendant received a blow on his head which affected his mind to some extent, and that, when under excitement or anger, such affection caused him to lose mental control of himself, together with mental control of his power to distinguish between right and wrong, and that, at the time of the killing, defendant was laboring under great mental excitement, and entertained no malice towards deceased, but merely wished to protect himself, and that the affection of his mind produced a mental delusion magnifying the extent of his danger, and that, while laboring under such delusion, and without malice, he shot and killed deceased, or, if the jury had a doubt as to the truth of such facts, they should acquit defendant, was properly refused, as improperly drawn, and on the weight of evidence. *Ib.*

23. SAME.

An instruction in a prosecution for homicide that if defendant's mind was measurably impaired by a blow on his head, and, while ordinarily sane, his mind would become so disordered under excitement as to cause him to lose power to distinguish between right and wrong, and was laboring under such disorder at the time of firing the fatal shot, and magnified, through a delusion, the danger to which he was exposed, and, without malice, and with a perfectly sincere belief that he was in immediate danger of death at the hands of deceased, fired the fatal shot, he should be acquitted, was properly refused, as an inaccurate statement of the law, and on the weight of evidence. *Ib.*

24. SAME. *Evidence of wastefulness.*

In a prosecution for homicide, evidence that defendant would spend his substance in purchasing articles for which he had no special use, and that he neglected to provide for the future support of his family, did not constitute proof of insanity. *Ib.*

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Criminal law and procedure.

CRIMINAL LAW AND PROCEDURE—*Continued.*

25. AUTREFOIS CONVICT. *Constituent crime. Misdemeanor. Felony.*

The conviction of a defendant by a justice of the peace of a misdemeanor is not a bar to an indictment for a felony of which the misdemeanor is a constituent; such a conviction for an assault and battery does not bar an indictment for an assault and battery with intent to kill and murder predicated of the same acts. *Huffman* v. *State*, 479.

26. SAME. *Code* 1892, § 1340. *Constitutional law. Constitution* 1890, *sec.* 22. *Jeopardy.*

Code 1892, § 1340, providing that the conviction of a defendant by a justice of the peace for a misdemeanor shall not bar a prosecution for a felony in the same matter, is not violative of Constitution 1890, sec. 22, declaring that a person shall not be twice placed in jeopardy for the same offense. *Ib.*

27. MURDER. *Jurors. New trial.*

If a juror on his *voir dire* states that he had formed and expressed an opinion as to the guilt of the accused, but that his opinion was not fixed and would not affect his verdict, and the accused does not offer to challenge him either for cause or peremptorily—his peremptory challenges not having been exhausted—he will not after conviction be granted a new trial because the juror had before being empaneled expressed the opinion that the accused ought to be convicted. *Schrader* v. *State*, 593.

28. SAME. *Conflicting evidence.*

The finding by the trial court on a motion for a new trial that a juror was not hostile to the accused will not be reversed where the testimony on the subject is conflicting. *Ib.*

29. SAME. *Instructions. Already given.*

It is not error to refuse an instruction the substance of which has already been given in another instruction. *Ib.*

30. SAME. *Previous difficulty. Third parties. Evidence.*

Evidence is admissible in a murder case of a difficulty, prior to the killing, between decedent and a third party, although defendant was not present when it occurred, if it tend to prove that the defendant, taking the part of the third person, forced deceased to engage in the difficulty in which he was killed by defendant. *Ib.*

31. SAME. *Instruction.*

Where the defendant shot and killed the deceased he is not entitled to an instruction telling the jury to acquit if they believe from the

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CRIMINAL LAW AND PROCEDURE—*Continued.*

evidence that defendant insulted and struck deceased and thereupon deceased shot defendant and defendant then killed deceased, failing to negative the idea that defendant provoked the difficulty with intent to overcome deceased. *Schrader* v. *State*, 593.

32. MURDER. *Improper argument.*

The language of the prosecuting attorney in his closing argument on a trial for murder, to the effect that he would show how people regarded the accused, and that policemen, knowing his past, did not try to stop him after the killing, did not constitute reversible error, though no evidence was introduced as to the character of accused. *Ib.*

33. MURDER. *Evidence. Previous difficulties.*

On the trial of a murder case testimony touching previous difficulties between defendant and deceased, and between defendant and his wife, a daughter of deceased, is inadmissible. *Thompson* v. *State*, 758.

34. SAME. *Cross-examination of accused. Conversation.*

It is error to permit the defendant in a murder case, who testified in his own behalf, to be cross-examined touching statements made by him in a certain conversation after the court had properly excluded the testimony of other witnesses concerning the conversation. *Ib.*

CROSS-BILL.

CHANCERY PRACTICE. *Prayer for general relief. Reformation granted.*

Where a cross-bill based on a mistake in a deed concluded with a prayer for general relief, the chancellor should have decreed that the cross-complainants were, as to the cross-defendants, the owners of the property in question, where the proof showed such to be the case, although the cross-bill did not seek the reformation of the deed. *Moore* v. *Crump*, 612.

CUSTOM.

1. CARRIER. *Custom not to give notice.*

A custom of a common carrier not to give notice to the consignee of the arrival of goods will not terminate its liability as carrier, but the same will continue until such notice is given. *Gulf, etc., R. R. Co.* v. *Horton*, 490.

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CUSTOM—*Continued.*

2. RAILROADS. *Contributory negligence.*

The custom of a certain train to use the main line of a track at a station does not deny it the right to use a side track, or excuse any person walking on the side track when such train is approaching, for a failure to exercise ordinary care. *Morehead* v. *Yazoo, etc., R. R. Co.*, 112.

DAMAGES.

1. COUNTIES. *Injunctions. Dissolution. Solicitor's fees.*

Solicitor's fees are allowable as damages upon the dissolution of an injunction restraining the board of supervisors of a county from removing a county seat. *Hinton* v. *Perry County*, 536.

2. RAILROADS. *Excessive verdict.*

Where plaintiff boarded a freight train erroneously believing that he had a right to travel thereon, and was expelled by the conductor, between stations on a stormy night, with abuse and cursing after an offer to pay his fare, a judgment for $2,000 in favor of plaintiff is excessive, and will be reversed unless $1,000 be remitted. *Alabama, etc., Ry. Co.* v. *Livingston*, 1.

3. SALES. *Case. Measure of damages.*

Where by the terms of a contract defendant agreed to buy plaintiff's cotton during a season at an agreed sum per hundred pounds less than the market price of cotton in a certain city on the day of sale and the plaintiff tendered a designated number of bales when the market price in said city was 9 13-16 cents per pound, which the defendant refused to buy at that price, but offered to do so on the basis of 9 9-16 cents per pound as the city market price, which plaintiff declined, subsequently selling at 9 cents per pound, the measure of plaintiff's damages is not the difference between 9 and 9 13-16 cents per pound, but the difference between 9 9-16 and 9 13-16 cents per pound. *American Cotton Co.* v. *Herring*, 693.

4. SAME.

Where defendant agreed to purchase all complainant's cotton during a season at twelve cents per one hundred pounds below the actual *bona fide* market value of the cotton in a warehouse at another place, and the agreement stated that the price would "ordinarily" be based on the last official quotation of the day, though defendant was not bound to adopt the closing quotations for the day as a basis by which to estimate the price which it would pay for the

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DAMAGES—*Continued.*

cotton, it could not, at any time, under the contract, compel complainant to take less than twelve cents per hundred pounds below the actual value of the cotton, whatever basis was adopted in arriving at that value. *American Cotton Co.* v. *Herring*, 693.

5. TELEGRAPH COMPANY. *Night message. Delay. Exemplary damages. Contributory negligence. Actual damages.*

The sendee of a telegraphic message is not entitled, because of delay in its delivery, to recover from the telegraph company:

(*a*) Exemplary damages in the absence of gross negligence, willful wrong and wanton disregard of plaintiff's rights; nor

(*b*) Actual damages which resulted not from delay in the delivery of the message, but from plaintiff's failure to promptly answer it when it was delivered *Western, etc., Tel. Co.* v. *Spratley*, 86.

6. SAME. *Disclosure of message. Punitive damages.*

The thoughtless disclosure by a telegraph operator of the contents of a message addressed to the plaintiff, relating to a public matter which otherwise would have become generally known in a very short time, does not justify the imposition of punitive damages on the telegraph company. *Cocke* v. *Western, etc., Tel. Co.*, 380.

7. VENDOR AND VENDEE. *Warranty of title. Breach. Interest.*

Interest on the purchase money paid for land is not recoverable as damages for breach of warranty of title when the evicted grantee has been acquitted of all liability to the owner of the land for mesne profits without paying the same; and in such case the proportion between the amount of the interest and the value of the mesne profits is wholly immaterial. *Mortgage Co.* v. *Todd*, 522.

8. SAME. *Mesne profits. Improvements and taxes. Proportion.*

The measure of damages recoverable for breach of warranty of title is not affected by the proportion that exists between the value of the mesne profits received by the evicted grantee and his outlay for improvements and taxes. *Ib.*

9. SAME. *Surplus. Set-off. Purchase money.*

The surplus of mesne profits received by an evicted grantee in excess of his outlay for improvements and taxes cannot in an action for breach of warranty of title be set off against the purchase money of the land on the ground that the same has been credited upon a mortgage debt due to the warrantor, in an equity suit wherein the mortgagor has procured the cancellation of the warrantor's purchase of the land under an invalid foreclosure of the mortgage. *Ib.*

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DAMAGES—*Continued.*

10. PUBLIC LANDS. *Conveyance. Warranty.*

One who purchases from another lands, the title to which is found to be in the United States, may sue at once, witnout awaiting eviction, upon the covenants in his deed, and if he perfect his title his measure of damages is the sums paid in doing so and other damages, if any, caused by the breach of the warranty. *Holloway* v. *Miller*, 776.

See LIQUIDATED DAMAGES.

Hardie-Tynes, etc., Co. v. *Glen-Allen, etc., Mill*, 259.

DECLARATIONS.

See PLEADINGS, 1, 2.

Illinois Central R. R. Co. v. *Abrams*, 456.

See EVIDENCE, 11.

Boyd v. *State*, 414.

DEEDS.

1. ACKNOWLEDGMENT OF PURCHASE MONEY. *Receipt. Parol evidence.*

An acknowledgment of the payment of the purchase money contained in a deed is but a receipt and may be contradicted by parol evidence. *Fowlkes* v. *Lea*, 509.

2. SAME. *Statute of limitations. Code* 1892, § 2737. *Written promise.*

A recital of a consideration in a deed, which is proved not to have been paid, is a promise in writing by the grantee to pay it, and such promise is only barred by the statute of limitations (Code 1892, § 2737), applicable to written promises. *Ib.*

3. DESCRIPTION. *Name of tract. Reformation. Evidence.*

A deed to a plantation describing the same by its well-known name, although reciting that it consisted of certain lands designated by government survey descriptions, aided by proof that the grantee, with the knowledge and consent of the grantor, entered into the possession of the lands which had previously passed as a part of the plantation, warrants the conclusion that the grantor intended to convey all of said lands and may be reformed so as to specifically include a part thereof not described therein by survey descriptions. *Miles* v. *Miles*, 624.

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Deeds.

DEEDS—*Continued.*

4. DESCRIPTION. *Intentional use of mistaken terms.*

The description of land in a deed may be reformed so as to embrace the tract sought to be conveyed, although the parties intentionally used the terms of description as written in the deed, if they did so under the mistaken impression that they properly described the tract. *Miles* v. *Miles*, 624.

5. SAME. *Consideration. Volunteers.*

The grantees in a deed, supported in part by a valuable consideration, are not mere volunteers, and are not precluded from having the deed reformed, although the entire consideration may not have been a valuable one. *Ib.*

6. SAME. *Concrete case.*

Where a deed from a grantor to his son was a part of the transaction by which a family settlement was arranged and perfected, and the purchase by such son of his brother's interest was a part of the consideration moving the grantor to divide the property, a court of equity would reform the deed to effectuate the intention of the parties, as they occupied the position of persons who had inherited the property, undertaken to divide it, and a mutual mistake had occurred. *Ib.*

7. GRANTOR. *Wrong person named as. Record. Notice.*

Where the scrivener, supposing a certain person was to execute a deed, wrote his name therein as the grantor, but it was signed, acknowledged, and delivered by another person not mentioned in the instrument, its record is not constructive notice to a subsequent purchaser that it was the deed of the person who signed it. *Marx* v. *Jordan*, 334.

8. RESERVATIONS.

In order for a reservation in a deed to be operative it must withhold from the grant something which would have passed by the deed but for the reservation. *Barataria, etc., Co.* v. *Ott*, 737.

9. SAME. *Construction.*

In construing a reservation in a deed it is not competent to show by evidence *aliunde* the intention of the parties, as the deed speaks for itself; and if the reservation be so indefinite as not to convey any certain meaning, it will be ineffectual. *Ib.*

10. ESTATES TAIL. *Limitations over to heirs of donor. Code* 1880, § 1190. *Code* 1892, § 2436.

Under Code 1880, § 1190 (Code 1892, § 2436), prohibiting estates tail, but providing that a conveyance or devise may be made to a suc-

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DEEDS—*Continued.*

cession of living donees, not exceeding two, and the heirs of the remainderman, and in default thereof to the right heirs of the donor in fee simple:

(*a*) A grantor who reserves out of the operation of his deed a life estate for himself cannot be counted as one of the donees within whose life the ultimate fee must vest in order to preserve the deed under the rule against perpetuities.

(*b*) A conveyance to two designated persons, with cross-remainders in favor of the survivor in case of the death of either without issue, and a conditional limitation over to a third person, the right heir of the donor, in case of the death of the two first takers, without issue, is valid.

(*c*) A limitation over to a designated person, being one of the right heirs of the donor, conditioned on the death of two specified donees without issue, is valid.

(*d*) The right heirs of the donor take by purchase, and not by descent.

(*e*) The section by its express terms is applicable to conveyances as well as devises.

(*f*) Its object is to prescribe a limit of time beyond which the vesting of the estate in fee cannot be suspended, but within that limit it permits the exercise of unbounded discretion by the donor. *Banking Co.* v. *Field*, 646.

11. ESTATES TAIL. *Code* 1880, § 1203. *Code* 1892, § 2448.

Under Code 1880, § 1203 (Code 1892, § 2448), changing the common law and providing that a clause in a deed or a will vesting title in one person in case of the death of another, without issue of his body, shall be held as a limitation to take effect when the person named shall die without issue of his body living at the time of his death or born to him within ten months thereafter, unless the intention of the limitation be otherwise expressly and plainly declared on the face of the instrument creating it:

(*a*) The first taker has an estate in fee, determinable on the contingency of death without surviving issue, and the limitation over is conditioned on the death of the first taker without issue.

(*b*) A limitation over in case of the death of the first taker without issue is, in the absence of a plain declaration to the contrary, a limitation in case of his death without issue living at the time of his death or born in ten months thereafter, so that the first taker has a life estate, and the issue surviving, or born within ten months, will have a fee simple by way of an executory devise; but if the deed or

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DEEDS—*Continued.*

will plainly declares a different construction, an estate tail will be created, which, under the statute (Code 1880, § 1190; Code 1892, § 2436), is a fee simple in the first taker.

(*c*) A conditional limitation does not cut down the prior estate in fee, nor extend nor accelerate its termination, but takes effect only at its termination. *Banking Co.* v. *Field*, 646.

12. ESTATES TAIL. *Concrete case.*

A deed conveyed certain property to A. to hold the same on the following trust: (1) That the grantor should have the exclusive right to the possession and control of the property granted during his lifetime, and be entitled to the rents and profits arising therefrom; (2) that on the death of the grantor A. should have the possession and control of the property, and receive for his services one-third of the rents and profits, and use the remainder of the rents and profits for the maintenance and education of B. and C. It was then provided that on the death of A. the property should vest in B., one-half for herself and the other half in trust for C.; but in case of the death of B. or C. "without issue of the body" the whole property should vest in the survivor, subject to the rights of A., and in case both B. and C. should die without issue the whole property should vest absolultely in A. or his heirs at law. The court decided that the effect of the deed was to reserve to the grantor a legal life estate, with remainder over in fee to B. and C., their fees being determinable on the contingency of dying without surviving issue, in which case there were cross-limitations in favor of the survivor and a conditional limitation over to A. in case of the death without surviving issue of both B. and C. *Ib.*

DEEDS OF TRUST.

1. CHANCERY PLEADINGS. *Fraud. Facts must be pleaded.*

A bill in equity, to set aside a sale under a deed of trust on the ground of fraud, is demurrable, if it fail to state the facts of which the charge of fraud is predicated. *Weir* v. *Jones*, 602.

2. SAME. *Trust deed. Foreclosure. Notice.*

A bill in equity to set aside a sale of lands is demurrable, if it admit that the lands were regularly sold, under a valid deed of trust, for the collection of a just and past due debt, and that complainants knew of the sale in ample time to have enjoined the same on any valid objection, although it charge that the sale was the result of a conspiracy between the trustee and the holder of a junior mortgage

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Deeds of trust.

DEEDS OF TRUST—*Continued.*

on the land, and that the beneficiary in the deed of trust did not desire to foreclose the deed when the sale was made. *Weir* v. *Jones*, 602.

3. CHANCERY PLEADINGS. *Substituted trustee. Duty.*

Where the beneficiary in a deed of trust regularly appointed a substituted trustee, by a writing containing a direction that the trustee proceed to foreclose the deed, it is the duty of the trustee to proceed as directed. *Ib.*

4. SAME. *Tender of interest.*

The trustee in a deed of trust to secure a past due debt is not required to postpone a duly advertised sale of the property because the debtor tenders part payment, the interest, in the absence of any provision to that effect in the deed. *Ib.*

5. SAME. *Foreclosure. Agreement with junior incumbrancer.*

If the beneficiary in a deed of trust had the right to have it foreclosed when the sale was made, the fact that it was made as the result of an agreement with a junior incumbrancer in no way affects its validity. *Ib.*

6. SAME. *Junior mortgage.*

Where a senior lien is duly enforced by the sale of land the validity of the sale is not affected by the invalidity of a junior mortgage. *Ib.*

7. SUBSTITUTED TRUSTEE. *Appointment. Attorney in fact.*

The attorney in fact of the beneficiary of a deed of trust cannot appoint a substituted trustee where the deed provides for the appointment "by the beneficiary or any holder of the notes secured or their legal representatives." *Allen* v. *Alliance Trust Co.*, 319.

8. LANDLORD AND TENANT. *Waiver of lien. Advances to tenant.*

A landlord who waives his lien to the extent of a designated sum in order that the tenant may secure advances from another by executing a deed of trust on his crops to be grown on the leased premises, cannot escape the effect of the waiver because the deed of trust recited that the advances were to be used also in making a crop on other lands, and did not expressly require advances to the full extent of the waiver. *Dreyfus* v. *Gage*, 219.

9. SAME. *Assignee of rent notes. Estoppel.*

An assignee of notes given by a tenant to his landlord for rent is estopped to assert the priority of his statutory lien against one who makes advances to the tenant on the security of the landlord's

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DEEDS OF TRUST—*Continued.*

waiver and the tenant's trust deed on the crops to be grown on the demised premises, when such assignee has concealed from him his ownership of the notes and induced him to believe that the landlord's waiver and the tenant's trust deed will operate to give him a first lien on the crops. *Dreyfus* v. *Gage*, 219.

DEPOSITIONS.

EXECUTORS. *Accounting. Representative of deceased executor. New party.*

Where a suit is begun by a distributee of an estate to compel an accounting by a surviving executor it is proper, on application of the survivor, to make the personal representative of the deceased executor a party to the proceeding, and in such case depositions taken before the representative of the deceased executor was made a party are admissible. *Owens* v. *Owens*, 673.

DESCENT AND DISTRIBUTION.

1. MONEY APPROPRIATED BY CONGRESS. *Deceased heirs. Legatees.*

The representatives of deceased heirs are entitled to share with the living heirs a sum of money appropriated by congress to the administrator of their common ancestor in payment of a claim against the government. *Nutt* v. *Forsythe*, 211.

2. EXEMPT PROPERTY. *Widow's right. Partition. Rent, etc. Code* 1892, § 1551, *amended Laws* 1900, *p.* 129. *Code* 1892, § 1553.

Under Code 1892, § 1551, as Amended Laws, 1900, p. 129, and Code 1892, § 1553, regulating the subject, exempt property, real and personal, left by a deceased husband descends to his widow and children—grandchildren taking *per stirpes* the share of deceased children—as tenants in common; but the widow has the right to occupy and use the same, freed from liability for rent or hire and from partition during her widowhood. *Martin* v. *Martin*, 553.

DESCRIPTION.

1. AMBIGUITY. *Contract to convey land. Description. Name of tract.*

A contract purporting to obligate the owner to convey a tract of land by name (as the "Phil Allen place") and naming the number of acres therein, does not contain a patent ambiguity, and it is valid where by extrinsic evidence it can with certainty be shown what lands were known by the name. *Raines* v. *Baird*, 807.

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DESCRIPTION—*Continued.*

2. FRAUDULENT CONVEYANCE. *Equity between grantor and grantee. Creditor's right. Cancellation.*

A creditor's bill to set aside a fraudulent conveyance made by his debtor should not be dismissed, or relief narrowed, because the land is so defectively described in the deed as to render it void upon its face, since such a deed creates in the grantee as against the grantor an equity in the land intended to be conveyed which the creditor is entitled to have cancelled. *Levy* v. *Royston,* 15.

3. DEEDS. *Name of tract. Reformation. Evidence.*

A deed to a plantation describing the same by its well-known name, although reciting that it consisted of certain lands designated by government survey descriptions, aided by proof that the grantee, with the knowledge and consent of the grantor, entered into the possession of the lands which had previously passed as a part of the plantation, warrants the conclusion that the grantor intended to convey all of said lands and may be reformed so as to specifically include a part thereof not described therein by survey descriptions. *Miles* v. *Miles,* 624.

4. SAME. *Intentional use of mistaken terms.*

The description of land in a deed may be reformed so as to embrace the tract sought to be conveyed, although the parties intentionally used the terms of description as written in the deed, if they did so under the mistaken impression that they properly described the tract. *Ib.*

5. SAME. *Consideration. Volunteers.*

The grantees in a deed, supported in part by a valuable consideration, are not mere volunteers, and are not precluded from having the deed reformed, although the entire consideration may not have been a valuable one. *Ib.*

6. SAME. *Concrete case.*

Where a deed from a grantor to his son was a part of the transaction by which a family settlement was arranged and perfected, and the purchase by such son of his brother's interest was a part of the consideration moving the grantor to divide the property, a court of equity will reform the deed to effectuate the intention of the parties, as they occupied the position of persons who had inherited the property, undertaken to divide it, and a mutual mistake had occurred. *Ib.*

DISCRIMINATION.

See INTERSTATE COMMERCE, 1.

Laurel Cotton Mills v. *Gulf & Ship Island R. R. Co.,* 339.

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DISTRICT ATTORNEYS.

COUNTY. *Contracts. Chemical analysis of stomach. Criminal procedure.*

A district attorney, in the absence of statutory authority, cannot by contract bind the county to pay for the chemical analysis of the stomach of a deceased person supposed to have been poisoned, although the analysis be a necessary aid to the enforcement of the criminal law. *Jones* v. *Sunflower County*, 98.

DIVIDENDS.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Union, etc., Bank v. *Duncan*, 467.

DOMICILE.

PARENT AND CHILD.

The domicile of a father is the domicile of his infant children. *Boyle* v. *Griffin*, 41.

DYING DECLARATIONS.

1. ANSWER TO INQUIRY.

In a prosecution for murder by poisoning, one of the theories of the defense being that deceased poisoned herself, a statement by the deceased, made while *in extremis* and knowing that she was about to die, in answer to an inquiry by her attending physician as to whether she had taken anything into her stomach, in these words, "The Lord is my witness, I have taken nothing except what you gave me," is admissible as a dying declaration. *Boyd* v. *State*, 414.

2. SAME. *Statements to dying party.*

In such case it is inadmissible to prove that, just before the dying declaration was made, the physician told deceased that her husband, the defendant, was under suspicion, and that she should state whether she had so taken anything. *Ib.*

EJECTMENT.

POSSESSION. *Intruder. Paper title. Code* 1892, § 2734.

Possession of land for ten years gives the possessor and those claiming under him a sufficient title to justify a recovery in ejectment against a mere intruder who has no title. (See Code 1892, § 2434.) *Anderson* v. *Moore*, 400.

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EMINENT DOMAIN.

FOREIGN CORPORATION.

A foreign railroad corporation, having the right to do all acts incidental to the maintenance of its railroad, will not be denied the right to lay conduits under its right of way across streets because it has no right to exercise the power of eminent domain. *Canton* v. *Canton, etc., Warehouse Co.*, 268.

ENDORSEMENT.

See BANKS AND BANKING.

Continental, etc., Bank v. *First National Bank*, 103.

ENROLLMENT OF JUDGMENTS, 6, 7.

See JUSTICE OF THE PEACE.

Wise v. *Thread*, 200.

EQUITY.

1. JURISDICTION. *Multiplicity of suits. Inadequacy of legal remedy.*

Where property destroyed by fire was insured in three insurance companies, the policies containing substantially the same provisions, and the owner brought three separate suits at law, one against each company, demanding the face of each policy, and the companies filed the same pleas setting up the same defenses, a bill in equity will lie by the companies to restrain the suits at law requiring the suits to be tried in equity, on the grounds of preventing a multiplicity of suits and the inadequacy of the remedy at law. *Tisdale* v. *Three Insurance Companies*, 709.

2. STATUTE OF LIMITATIONS. *Adverse possession. Code* 1892, §§ 2730, 2731, 2734. *Reformation.*

Where a grantor owned only the north half of a section of land and, intending to convey it, by error conveyed the west half and the grantee took actual possession of the land intended to be conveyed:

(*a*) The grantor and those holding under him will be barred of all claim to the land intended to be but not actually conveyed after the expiration of ten years from the beginning of such possession; and

(*b*) Equity would, on proper application, reform the deed so as to make it convey the land intended to be conveyed. *Moore* v. *Crump*, 612.

See REFORMATION, 2, 3, 4, 5.

Miles v. *Miles*, 624.

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ESTATES OF DECEDENTS.

1. CONTRACT FOR SALE OF LAND. *Specific performance.*

Where the administrator of a decedent who contracted to convey lands is not a party to the suit, and complainant admits that the decedent was without title, specific performance of the contract should not be decreed. *Southworth* v. *Brownlow*, 405.

2. EXECUTORS. *Accounting. Representative of deceased executor. New party.*

Where a suit is begun by a distributee of an estate to compel an accounting by a surviving executor it is proper, on application of the survivor, to make the personal representative of the deceased executor a party to the proceeding. *Owens* v. *Owens*, 673.

3. SAME. *Depositions. New party.*

In such case depositions taken before the representative of the deceased executor was made a party are admissible. *Ib.*

4. SAME. *Appeal. Questions reviewable.*

In such case, upon appeal, the supreme court will not review matters which the court below expressly declined to pass upon, reserving the same for decision on fuller proof, nor will an assignment of error be considered which seeks to review the action of the court below holding an executor chargeable with a bond where after the appeal was taken the bond was accounted for by the executor. *Ib.*

5. SAME. *Executors charged with interest.*

Where executors collected money belonging to the estate, and rendered no accounts for more than two years, deposited the money in their own bank credited to them as guardians of the distributees, when they were not guardians, and the money so remained in bank for ten years, the bank in the meantime loaning money to the distributees at interest and selling property to them, taking interest-bearing notes therefor, they are chargeable with interest at the legal rate during the time the money was in the bank. *Ib.*

6. SAME.

Where executors, without excuse, left a sum due the estate in the hands of the debtor for nearly fifteen years, not collecting it till compelled to do so in a proceeding for an accounting, they were chargeable with interest on the amount. *Ib.*

7. SAME. *Commissions. Donation. Return to estate.*

Where it appeared that an executor intended to return his commissions to the estate, it was improper to treat such intention as a donation to a part of the distributees, as each of the distributees was entitled to share therein. *Ib.*

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Estates of decedents.

ESTATES OF DECEDENTS—*Continued.*

8. DECEASED HEIRS. *Legatees.*

The representatives of deceased heirs are entitled to share with the living heirs a sum of money appropriated by congress to the administrator of their common ancestor in payment of a claim against the government. *Nutt* v. *Forsythe,* 211.

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Under Code 1892, § 1551, as amended Laws 1900, p. 129, and Code 1892, § 1553, regulating the subject, exempt property, real and personal, left by a deceased husband descends to his widow and children—grandchildren taking *per stirpes* the share of the deceased children—as tenants in common; but the widow has the right to occupy and use the same, freed from liability for rent or hire and from partition during her widowhood. *Martin* v. *Martin,* 553.

10. PROBATION OF CLAIMS. *Code* 1892, § 1932.

Under Code 1892, § 1932, regulating the subject, a claim for professional services rendered the decedent, not based upon an itemized account, is sufficiently stated for probation against his estate if it be in writing, and specify a definite sum as due from decedent to claimant "for legal advice and service rendered" to decedent. *Foster* v. *Schaffer,* 197.

11. WILLS. *Construction. Express trust. Payment of debts.*

A will creates an express trust for the payment of the testator's debts, which by its various items provides (1) for the payment of the debts as soon as it can be done without injury to the estate; (2) for the payment of one hundred dollars and an annuity to a servant; (3) that the testator's widow shall have all of his personal property during her life, with power to sell and dispose of it as she might see fit, but in such event the proceeds are to be placed in the corpus of the estate, subject to the provisions of the will; (4) for the sale of encumbered real estate in another state "as soon as can be done without too great loss," with discretion to lease or sell at public or private sale and authorizing the extension of the payments due on the property or the renewal or execution of other judicious loans and mortgages to pay the encumbrance; (5) full power for the executors to carry on and cultivate the testator's plantations or to lease or sell any and all real or personal property of the testator in this state, which may be deemed expedient to pay debts, but directing certain pieces of land to be reserved until the last; (6) that the widow shall claim no allowance and charge no commissions for services rendered the estate, but shall be allowed a reasonable

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Estates of decedents.

ESTATES OF DECEDENTS—*Continued.*

amount for the support of herself, family, and household, to be charged against testator's estate and be decided by her own judgment; (7) that the executors shall, "subject to the foregoing articles," have the entire control of the estate, and his widow the entire use of the income, rents, and profits thereof for her life, with power to dispose of one-fourth of the estate remaining at her death by will, in default of which the one-fourth was to remain a part of the estate; and (8) for the disposal of the remainder of the estate, subject to the life estate of the widow. *Gordon* v. *McDougall*, 715.

12. WILLS. *Code* 1892, § 1838. *Statute of limitations on probating claims. Code* 1892, § 1933.

The statute of limitations, Code 1892, § 1933, providing that claims against the estate of a decedent shall be barred unless probated within one year after the publication of notice to creditors to probate their claims, has no application where the will of the decedent creates an express trust for the payment of debts, under Code 1892, § 1838, providing that executors, whenever empowered by the will to pay debts, shall follow the directions of the will, as well as the general principles applicable to express trusts. *Ib.*

13. SAME. *Accounting. Unprobated claims.*

Executors who have paid unprobated claims against the testator's estate, in conformity with the directions of a will, creating an express trust for their payment, should be credited therewith in their accounts. *Ib.*

14. WITNESSES. *Competency. Code* 1892, § 1740. *Husband and wife. Ante-nuptial contract.*

Where a married woman died leaving a will and the surviving husband sought under the statute, Code 1892, § 4496, to renounce the will and take a share of her estate, in opposition to which was pleaded an ante-nuptial contract empowering the wife to dispose of her property by will as she should see proper, the husband was incompetent as a witness to impeach the contract as a forgery, under Code 1892, § 1740, providing that a person shall not testify to establish his own claim against the estate of a decedent. *Watson* v. *Duncan*, 763.

15. SAME. *Code* 1892, § 1740.

Witnesses are incompetent to testify to establish their own claims against the estate of a decedent, under Code 1892, § 1740, so providing. *Moore* v. *Crump*, 612.

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ESTATES OF DECEDENTS—*Continued.*

16. LAST ILLNESS. *Nursing. Code* 1892, § 1965. *Life insurance. Exemption.*

A claim for nursing a decedent in his last illness is a debt against him, and the proceeds of a life insurance policy, exempt from the debts of the decedent, under Code 1892, § 1965, is not chargeable therewith. *Dobbs* v. *Chandler*, 372.

17. SAME. *Funeral expenses. Attorney's fees. Code* 1892, § 1957.

The funeral expenses of the decedent and the administrator's attorney's fees for the conduct of the administration are not debts against him, and the administrator of his estate may pay the same with the proceeds of a life insurance policy which is exempt from liability for his debts. *Ib.*

ESTATES TAIL.

1. DEEDS. *Construction. Estates tail. Limitations over to heirs of donor. Code* 1880, § 1190. *Code* 1892, § 2436.

Under Code 1880, § 1190 (Code 1892, § 2436), prohibiting estates tail, but providing that a conveyance or devise may be made to a succession of living donees, not exceeding two, and the heirs of the remainderman, and in default thereof to the right heirs of the donor in fee simple:

(*a*) A grantor who reserves out of the operation of his deed a life estate for himself cannot be counted as one of the donees within whose life the ultimate fee must vest in order to preserve the deed under the rule against perpetuities.

(*b*) A conveyance to two designated persons, with cross-remainders in favor of the survivor in case of the death of either without issue, and a conditional limitation over to a third person, the right heir of the donor, in case of the death of the two first takers, without issue, is valid.

(*c*) A limitation over to a designated person, being one of the right heirs of the donor, conditioned on the death of two specified donees without issue, is valid.

(*d*) The right heirs of the donor take by purchase, and not by descent.

(*e*) The section by its express terms is applicable to conveyances as well as devises.

(*f*) Its object is to prescribe a limit of time beyond which the vesting of the estate in fee cannot be suspended, but within that limit it

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permits the exercise of unbounded discretion by the donor. *Middlesex Banking Co.* v. *Field*, 646.

2. DEEDS. *Code* 1880, § 1203. *Code* 1892, § 2448.

Under Code 1880, § 1203 (Code 1892, § 2448), changing the common law and providing that a clause in a deed or a will vesting title in one person in case of the death of another, without issue of his body, shall be held as a limitation to take effect when the person named shall die without issue of his body living at the time of his death or born to him within ten months thereafter, unless the intention of the limitation be otherwise expressly and plainly declared on the face of the instrument creating it:

(*a*) The first taker has an estate in fee, determinable on the contingency of death without surviving issue, and the limitation over is conditioned on the death of the first taker without issue.

(*b*) A limitation over in case of the death of the first taker without issue is, in the absence of a plain declaration to the contrary, a limitation in case of his death without issue living at the time of his death or born in ten months thereafter, so that the first taker has a life estate, and the issue surviving, or born within ten months, will have a fee simple by way of an executory devise; but if the deed or will plainly declares a different construction, an estate tail will be created, which, under the statute (Code 1880, § 1190; Code 1892, § 2436), is a fee simple in the first taker.

(*c*) A conditional limitation does not cut down the prior estate in fee, nor extend nor accelerate its termination, but takes effect only at its termination. *Ib.*

3. SAME. *Concrete case.*

A deed conveyed certain property to A. to hold the same on the following trusts: (1) That the grantor should have the exclusive right to the possession and control of the property granted during his lifetime, and be entitled to the rents and profits arising therefrom; (2) that on the death of the grantor A. should have the possession and control of the property, and receive for his services one-third of the rents and profits, and use the remainder of the rents and profits for the maintenance and education of B. and C. It was then provided that on the death of A. the property should vest in B., one-half for herself and the other half in trust for C.; but in case of the death of B. or C. "without issue of the body" the whole property should vest in the survivor, subject to the rights of A., and in case both B. and C. should die without issue the whole property should vest absolutely in A. or his heirs at law. The court

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ESTATES TAIL—*Continued.*

decided that the effect of the deed was to reserve to the grantor a legal life estate, with remainder over in fee to B. and C., their fees being determinable on the contingency of dying without surviving issue, in which case there were cross-limitations in favor of the survivor and a conditional limitation over to A. in case of the death without surviving issue of both B. and C. *Middlesex Banking Co.* v. *Field*, 646.

ESTOPPEL.

1. APPEAL. *Consent to decree. Acceptance of proceeds.*

A creditor of the estate of a decedent who was a party to a suit by which title to land was adjudged to have been in the decedent at the time of her death and the decree in which ordered the land sold to pay debts, is estopped to appeal therefrom after the sale has been made, and, by his consent, confirmed and he has received the sum due him from the estate out of its proceeds. *Parsons* v. *Rutherford*, 70.

2. INFANTS. *Contracts. Misrepresentation of age. Mortgage. Necessaries.*

Where a borrower obtained a loan of money on the faith of his representation that he was an adult, he cannot defeat a mortgage given to secure the loan because of his infancy at the time, especially where the money was used by him in the purchase of necessaries. *Ostrander* v. *Quin*, 230.

3. LANDLORD AND TENANT. *Assignee of rent notes. Estoppel.*

An assignee of notes given by a tenant to his landlord for rent is estopped to assert the priority of his statutory lien against one who makes advances to the tenant on the security of the landlord's waiver and the tenant's trust deed on the crops to be grown on the demised premises, when such assignee has concealed from him his ownership of the notes and induced him to believe that the landlord's waiver and the tenant's trust deed will operate to give him a first lien on the crops. *Dreyfus* v. *Gage*, 219.

4. SAME. *Waiver of lien. Commingling goods.*

A landlord who has waived his lien for rent in favor of one who advances supplies to a tenant on the security of a deed of trust on his cotton crop, is, after receiving cotton to the amount of four bales from the tenant and mingling the same with his own, estopped to deny that a bale of cotton seized by the trustee was produced by the tenant on the demised premises. *Alexander* v. *Zeigler*, 560.

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Evidence.

EVIDENCE.

1. ARBITRATION. *Impeachment of award. Arbitrator incompetent witness.*
It is not competent to impeach an award by the testimony of an arbitrator who executed the same. *Mississippi Cotton Oil Co.* v. *Buster,* 91.

2. BAILMENTS. *Action by bailor. Bookkeeping bad.*
A bailor in an action against a bailee for the value of the subject of the bailment is not precluded from making out his case by other competent evidence because he cannot make an intelligent statement of his losses from his own badly kept account books. *Knoop* v. *Columbus, etc., Co.,* 239.

3. CRIMINAL LAW. *Murder.*
Where, on a prosecution for murder, there was no evidence of a conspiracy between the defendant and others, who were present at the killing, it was error to admit testimony, over defendant's objection:
(*a*) That defendant and such other persons were at the place where deceased was working on the day of the homicide, but before it occurred;
(*b*) That such other persons who were with the defendant at the time of the killing were armed with sticks which were deadly weapons, and that some of them participated in the homicide; and
(*c*) That defendant and another were at a certain store on the day before the killing, when defendant called for pistol cartridges, without permitting defendant to prove by that other how he came to be with defendant. *Pulpus* v. *State,* 49.

4. SAME. *New trial. Conflicting evidence.*
The finding by the trial court on a motion for a new trial that a juror was not hostile to the accused will not be reversed where the testimony on the subject is conflicting. *Schrader* v. *State,* 593.

5. SAME. *Previous difficulty. Third parties.*
Evidence is admissible in a murder case of a difficulty, prior to the killing, between decedent and a third party, although defendant was not present when it occurred, if it tend to prove that the defendant, taking the part of the third person, forced deceased to engage in the difficulty in which he was killed by defendant. *Ib.*

6. SAME. *Murder. Evidence. Previous difficulties.*
On the trial of a murder case testimony touching previous difficulties between defendant and deceased, and between defendant and his wife, a daughter of deceased, is inadmissible. *Thompson* v. *State,* 758.

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Evidence.

EVIDENCE—*Continued.*

CRIMINAL LAW. *Cross-examination of accused. Conversations.*

It is error to permit the defendant in a murder case, who testified in his own behalf, to be cross-examined touching statements made by him in a certain conversation after the court had properly excluded the testimony of other witnesses concerning the conversation. *Thompson* v. *State*, 758.

7. SAME. *Instructions. Want of. Weight of.*

Instructions in a criminal case, as well as a civil one, should be refused if they be upon the weight of the evidence or if there be no evidence of which to predicate them. *Tidwell* v. *State*, 475.

8. SAME. *Homicide. Insanity.*

In a prosecution for homicide, a requested instruction that if the defendant received a blow on his head which affected his mind to some extent, and that, when under excitement or anger, such affection caused him to lose mental control of himself, together with mental control of his power to distinguish between right and wrong, and that, at the time of the killing, defendant was laboring under great mental excitement, and entertained no malice towards deceased, but merely wished to protect himself, and that the affection of his mind produced a mental delusion magnifying the extent of his danger, and that, while laboring under such delusion, and without malice, he shot and killed deceased, or, if the jury had a doubt as to the truth of such facts, they should acquit defendant, was properly refused, as improperly drawn, and on the weight of evidence. *Ib.*

9. SAME.

An instruction in a prosecution for homicide that if defendant's mind was measurably impaired by a blow on his head, and, while ordinarily sane, his mind would become so disordered under excitement as to cause him to lose power to distinguish between right and wrong, and was laboring under such disorder at the time of firing the fatal shot, and magnified, through a delusion, the danger to which he was exposed, and, without malice, and with a perfectly sincere belief that he was in immediate danger of death at the hands of deceased, fired the fatal shot, he should be acquitted, was properly refused, as an inaccurate statement of the law, and on the weight of evidence. *Ib.*

10. SAME. *Evidence of wastefulness.*

In a prosecution for homicide, evidence that defendant would spend his substance in purchasing articles for which he had no special use, and that he neglected to provide for the future support of his family, did not constitute proof of insanity. *Ib.*

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Evidence.

EVIDENCE—*Continued.*

11. CRIMINAL LAW. *Poisoning. Declarations res jestae. Symptoms of suffering.*

In a prosecution for murder by poisoning the declarations of the deceased describing the symptoms of her then present sufferings are admissible in evidence, but a narration of the symptoms of past sufferings is inadmissible. *Boyd* v. *State,* 414.

12. SAME. *Chemical experiments.*

On a prosecution for murder by poisoning with arsenic where a physician, as a state's witness, produced several bottles which he testified contained the medicines which he had prescribed for the deceased during her last illness and showed the effects of arsenic on each of them, changing the color of the liquids, it was error to permit the state to prove that defendant, during the last illness of deceased, gave her a punctured orange, which she refused to eat, from which juice oozed of a color like one of the medicines with which arsenic had been mixed, in the absence of evidence showing that the orange contained poison or that any of the medicine taken by deceased had been changed in color. *Ib.*

13. SAME.

In a prosecution for murder by poisoning, it having been shown that deceased had been taking certain dyspepsia medicine and that the bottle containing the medicine had been kept on a shelf, in a room to which a number of persons had access, it was error to permit a witness to testify that the deceased told him, in the absence of the defendant, where she had placed the bottle of medicine, that when witness looked for it there it had been moved, and that it was afterwards found on another shelf, hidden by other bottles, having in it a liquid containing poison and of a different color from the medicine. *Ib.*

14. SAME.

Where the theory of the state was that defendant had poisoned his deceased wife in order that he might continue illicit relations with another woman, and there was no evidence whatever tending to show that such woman was in any way implicated in administering any poison to deceased, an instruction that the jury should convict if they believed beyond a reasonable doubt that defendant mixed the poison, "or procured it to be done by another," was erroneous. *Ib.*

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Evidence.

EVIDENCE—*Continued.*

15. CRIMINAL LAW. *Chemical experiments.*

Where the theory of the state was that defendant had poisoned deceased, it was proper to permit evidence that defendant had disputed the statement of a witness at the preliminary examination to the effect that defendant had purchased poison from witness. *Boyd* v. *State*, 414.

16. SAME.

On a prosecution for murder it was error to admit evidence that accused did not testify before the justice who conducted the preliminary examination. *Boyd* v. *State*, 414.

17. SAME.

On a prosecution for murder it was error to permit a witness for the state to testify that he had testified to the same facts at the preliminary examination. *Ib.*

18. DEEDS. *Description. Name of tract. Reformation.*

A deed to a plantation describing the same by its well-known name, although reciting that it consisted of certain lands designated by government survey descriptions, aided by proof that the grantee, with the knowledge and consent of the grantor, entered into the possession of the lands which had previously passed as a part of the plantation, warrants the conclusion that the grantor intended to convey all of said lands and may be reformed so as to specifically include a part thereof not described therein by survey descriptions. *Miles* v. *Miles*, 624.

19. SAME. *Acknowledgment of purchase money. Receipt. Parol evidence.*

An acknowledgment of the payment of the purchase money contained in a deed is but a receipt and may be contradicted by parol evidence. *Fowlkes* v. *Lea*, 509.

20. SAME. *Statute of limitations. Code* 1892, § 2737. *Written promise.*

A recital of a consideration in a deed, which is proved not to have been paid, is a promise in writing by the grantee to pay it, and such promise is only barred by the statute of limitations (Code 1892, § 2737), applicable to written promises. *Ib.*

21. ESTATE OF DECEDENT. *Witnesses. Code* 1892, § 1740.

The testimony of the heirs of the husband to a contract between him and his wife, made shortly before and in contemplation of their marriage, to the effect that the surviving husband or wife should take only a life estate in the property of the other, is not incom-

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petent against the estate of the wife under Code 1892, § 1740, providing that no one shall testify to establish his own claim against the estate of a decedent which originated in the lifetime of the deceased, since in such case the question is one of inheritance and not a claim which originated in the lifetime of the wife. *Steen* v. *Kirkpatrick*, 63.

22. EXECUTORS. *Accounting. Representative of deceased executor. New party. Depositions.*

Where a suit is begun by a distributee of an estate to compel an accounting by a surviving executor it is proper, on application of the survivor, to make the personal representative of the deceased executor a party to the proceeding, and in such case depositions taken before the representative of the deceased executor was made a party are admissible. *Owens* v. *Owens*, 673.

23. JUDGMENT. *Suit upon. Loss of record. Code* 1892, § 1792. *Laws* 1896, *p.* 108.

In an action upon a judgment rendered by a justice of the peace a certified copy of the judgment roll is admissible in evidence, under Code 1892, § 1792, as amended, Laws 1896, p. 108, making such certificate competent evidence of enrollment, the records of the justice of the peace who rendered the judgment having been destroyed. *Wise* v. *Thread*, 200.

24. PRACTICE. *Excluding all evidence. Rule.*

Upon a motion to exclude all the testimony, not only the facts expressly testified to, but all inferences necessarily and logically to be deduced therefrom, are to be taken as true, in favor of the party against whom such motion is interposed. *Alexander* v. *Zeigler*, 560.

25. WITNESSES. *Contradicting one's own. Hostile witness. Entrapped into introducing. Previous statements. Materiality.*

The state cannot contradict its own witness by showing his previous statements, unless entrapped into introducing a hostile one, and in such case only by showing statements which are material to the main issue. *Dunk* v. *State*, 452.

26. SAME.

A district attorney, who calls a witness for the state without previous conference with him, cannot claim that he was entrapped and treat the witness as hostile, because his testimony is disappointing and not in harmony with what other persons had represented that it would be. *Ib.*

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EVIDENCE—*Continued.*

27. WITNESSES. *Woman. Bastard.*

On the trial of a murder case it is competent for the state to show that a female witness for defendant is his mistress; but the paternity of her children by other men is incompetent. *Ivy* v. *State*, 264.

28. SAME. *Self-incrimination. Advice.*

If a female witness be asked in a murder case who is the father of her illegitimate child, she should, where her answer might subject her to a criminal prosecution, be advised by the court of her right to decline to answer the question. *Ib.*

EXCESSIVE VERDICT.

See DAMAGES, 2.

Alabama & Vicksburg Ry. Co. v. *Livingston*, 1.

EXECUTORS AND ADMINISTRATORS.

See ESTATES OF DECEDENTS, 1, 2, 3, 4, 5, 6, 7, 13, 16, 17.

Southworth v. *Brownlow*, 405.

Owens v. *Owens*, 673.

Gordon v. *McDougall*, 715.

Dobbs v. *Chandler*, 372.

EXEMPTIONS.

1. DESCENT AND DISTRIBUTION. *Widow's right. Partition. Rent, etc. Code* 1892, § 1551, *amended Laws* 1900, *p.* 129. *Code* 1892, § 1553.

Under Code 1892, § 1551, as amended, Laws 1900, p. 129, and Code 1892, § 1553, regulating the subject, exempt property, real and personal, left by a deceased husband descends to his widow and children—grandchildren taking *per stirpes* the share of deceased children—as tenants in common; but the widow has the right to occupy and use the same, freed from liability for rent or hire and from partition during her widowhood. *Martin* v. *Martin*, 553.

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EXEMPTIONS—*Continued.*

2. ESTATE OF DECEDENTS. *Last illness. Nursing. Code* 1892, § 1965. *Life insurance.*

A claim for nursing a decedent in his last illness is a debt against him, and the proceeds of a life insurance policy, exempt from the debts of the decedent under Code 1892, § 1965, is not chargeable therewith. *Dobbs* v. *Chandler*, 372.

3. SAME. *Funeral expenses. Attorney's fees. Code* 1892, § 1957.

The funeral expenses of a decedent and an administrator's attorney's fees for the conduct of the administration are not debts against him, and the administrator of his estate may pay the same with the proceeds of a life insurance policy which is exempt from liability for his debts. *Ib.*

4. ATTORNEY'S LIEN. *Wages. Code* 1892, § 1963, *par.* 10a.

Money collected by an attorney on a claim due his client for wages, exempt from execution or garnishment under Code 1892, § 1963, par. tenth (a), is not exempt from the attorney's lien. *Halsell* v. *Turner*, 432.

EXHIBITS.

See SUPREME COURT PRACTICE, 2.

Weir v. *Jones*, 610.

EXPRESS TRUST.

See ESTATES OF DECEDENTS, 11, 12, 13.

Gordon v. *McDougall*, 715.

EXTRADITION.

1. HABEAS CORPUS. *Bail. Pendency of appeal. Murder. Code* 1892, § 2227.

Under Code 1892, § 2227, denying the benefits of the writ of *habeas corpus* to one charged with an offense committed in any other part of the United States, and who, agreeably to the constitution of the United States or the laws of the state, ought to be delivered up to the executive power of the state or territory where the offense is charged to have been committed, a person indicted for murder in another state—an offense not there bailable—and who has been ar-

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EXTRADITION—*Continued.*

rested in this state on a warrant issued by the governor upon requisition from the chief executive of such other state, is not entitled to bail pending his appeal to the supreme court from a judgment remanding him to custody in a *habeas corpus* proceeding based upon the ground that he is not a fugitive from justice and was not in such other state when the crime was committed. *Ex Parte Wall,* 783.

2. HABEAS CORPUS. *Bail. Pendency of appeal. Murder. Code* 1892, § 2227.

Distinction pointed out between cases of arrest and examination for commitment to await extradition demand and warrant, on the one hand, and cases arising on *habeas corpus* after arrest on executive warrant for extradition, on the other. *Ib.*

FARMING ON SHARES.

LANDLORD AND TENANT.

If the owner of a farm furnishes the land, team, and farm implements and feeds the team, and another furnishes the labor to make and gather the crops, to be divided between them, the relation between them is that of landlord and tenant. *Alexander* v. *Zeigler,* 560.

FELLOW SERVANTS.

1. RAILROADS. *Master and servant. Incompetent employes. Personal injuries. Common law liability. Ch.* 66, *Laws* 1898; *ch.* 87, *Laws* 1896.

The decision (*Ballard* v. *Cotton Oil Co.,* 81 Miss., 507) declaring ch. 66, Laws 1898, and ch. 87, Laws 1896, unconstitutional as class legislation, because of the modification of the fellow-servant rule therein contained was applied to all corporations without reference to the use of dangerous agencies in their business, does not relieve a railroad company of its common law liability for injuries causing the death of an employe when such injuries resulted from its employment, without due care, of other servants who were incompetent. *Yazoo, etc., R. R. Co.* v. *Schraag,* 125.

2. SAME. *Master and servant. Railroads. Constitution* 1890, *sec.* 193. *Code* 1892, § 3559.

A cause of action predicated of the master's negligence, in failing to furnish his servant a safe place in which to work, is inconsistent and should not be joined in the same count with a cause of action aris-

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FELLOW-SERVANTS—*Continued.*

ing from the negligence of a fellow-servant, based on Constitution 1890, sec. 193, and Code 1892, § 3559, modifying the common-law fellow-servant rule. *Illinois, etc., R. R. Co.* v. *Abrams*, 456.

3. RAILROADS. *Constitution 1890, sec. 193. Superior servant. Construction.*

A railroad employe, injured by the negligence of a superior officer or agent of the company having the right to direct his services, can recover therefor from the railroad company, under Constitution 1890, sec. 193, modifying the common-law fellow-servant rule, although his injuries were not received when executing some special command or order given by such officer or agent, but while engaged in the discharge of his ordinary duties, and when such officer or agent was engaged in discharging only the ordinary duties of his station. *Southern Ry. Co.* v. *Cheaves*, 565.

FIRES.

See RAILROADS, 14, 15.

Brister v. *Illinois, etc., R. R. Co.*, 33.

FOREIGN CORPORATIONS.

See CONTRACTS, 14.

Canton v. *Canton Cotton Warehouse Co.*, 268.

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS, 1, 2, 3, 4, 5.

Steen v. *Kirkpatrick*, 63.

Wear-Boogher, etc., Co. v. *Kelly*, 236.

Moore v. *Crump*, 612.

FRAUDULENT CONVEYANCES.

1. BANKRUPTCY. *Trustee. Suits by.*

A trustee in bankruptcy, as the representative of the creditors of the estate, may maintain a suit in equity to set aside fraudulent deeds made by the bankrupt, and subject the property conveyed to his debts. *Thompson* v. *First National Bank*, 54.

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FRAUDULENT CONVEYANCES—*Continued.*

2. DESCRIPTION. *Void. Equity between grantor and grantee. Creditor's right. Cancellation.*

A creditor's bill to set aside a fraudulent conveyance made by his debtor should not be dismissed, or relief narrowed, because the land is so defectively described in the deed as to render it void upon its face, since such a deed creates in the grantee as against the grantor an equity in the land intended to be conveyed which the creditor is entitled to have cancelled. *Levy* v. *Royston*, 15.

3. SAME. *Second deed. Procedure. Right to assail.*

Where, in a creditor's suit to cancel for fraud a deed made by his debtor, the court after hearing the cause announced its conclusion that the deed was void because of a defective description of the land, and, before final decree entered, the debtor executed a second deed perfecting the description, the cause should, on complainant's application, be remanded to the rules and complainant allowed to file a supplemental bill assailing the second deed. *Ib.*

4. TRUSTS. *Obtaining conveyance by fraud. Code* 1892, § 4230. *Parol evidence. Sufficiency of evidence.*

A trust, not within the statute of frauds (Code 1892, § 4230), and which may be established by parol, will be raised in favor of a party to whom land was intended to be granted or devised, if another by actual fraud obtains the legal title thereto; but the trust can be established only upon clear and convincing proof of the fraud. *Moore* v. *Crump*, 612.

FUNERAL EXPENSES.

ESTATE OF DECEDENT. *Attorney's fees. Code* 1892, § 1957.

The funeral expenses of a decedent and an administrator's attorney's fees for the conduct of the administration are not debts against him, and the administrator of his estate may pay the same with the proceeds of a life insurance policy which is exempt from liability for his debts. *Dobbs* v. *Chandler*, 372.

GARNISHMENT.

ATTACHMENT. *Garnishment. Change of venue. Code* 1892, § 2147.

A defendant in attachment cannot avail of the right to a change of venue given by Code 1892, § 2147, to garnishees who reside out of the county and whose answers are controverted. *McCloud* v. *McCullers*, 20.

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GOVERNOR.

MUNICIPALITIES.

The governor may approve applications for the incorporation of municipalities, since Code 1892, § 2921, Amended Laws 1898, p. 90, authorizing the governor to pass upon and approve applications for the incorporation of cities, towns, and villages not previously incorporated, is constitutional and does not submit to the executive questions belonging to the legislative department of the government, under Constitution 1890, sec. 88, providing that the legislature shall pass general laws for the incorporation of municipalities. *Jackson* v. *Whiting*, 163.

GUARDIANS.

FOREIGN APPOINTMENT. *Right to infants' funds. Code* 1892, § § 2211, 1925.

A foreign guardian is not required, under Code 1892, § 2211, empowering him to sue for and receive property of his ward upon the same terms as foreign executors and administrators are authorized to sue for and recover property belonging to a decedent's estate, to file his letters of guardianship, etc., in this state before receiving a check payable to himself as guardian, although, under Code 1892, § 1925, a foreign executor or administrator cannot sue for or recover the property of the estate until he has filed a certified copy of the record of his appointment in the proper chancery court in this state. *Boyle* v. *Griffin*, 41.

HABEAS CORPUS.

See EXTRADITION, 1.

Ex Parte Wall, 783.

HEIRS.

1. WILLS. *Construction. Technical words. Presumption.*

If it be apparent from a will that the testator used the word "heirs" in a different sense, the presumption that he used it in its technical sense will not prevail. *Harkleroad* v. *Bass*, 483.

2. SAME. *Case.*

Where the manifest object of the will was to provide for the testator's infant son, and it gave him lands for life and provided "should he leave any lawful issue at his death, then I will to his heirs forever, and should (he) die without heirs" the lands were to go to testator's grand-niece, the word "heirs" was used in the sense of "lawful issue," and upon the death of the son without issue the grand-niece took the estate. *Ib.*

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HIGHWAY CROSSINGS.

1. RAILROADS. *Code* 1892, § 3555. *Grades.*

Under Code 1892, § 3555, requiring a railroad company, where its track crosses a highway, to make a convenient crossing and keep it in good order, the grade in the highway required depends upon the extent to which the railroad track is above or below the natural surface of the ground. *Gulf, etc., R. R. Co.* v. *Sneed*, 252.

2. SAME. *Injuries to traveler.*

Under said section a railroad company is not liable for an injury to a traveler resulting from a defect in the highway beyond the crossing, although the highway where defective be on its right of way. *Ib.*

3. SAME. *Proximate and remote cause.*

Where a horse becomes frightened at an object lying in the highway, and the driver, in undertaking to force the animal past the object, causes it to back the vehicle into a gully at the side of the highway, thereby injuring the occupants of the vehicle, the condition of the highway is not the proximate cause of the injury. *Ib.*

HOLOGRAPHIC WILL.

1. WILLS. *Holograph. Private letter. Request for secrecy.*

A letter, testamentary in its character, wholly written, dated and signed by the testator, is a valid holographic will, although it contains a request that the person to whom it was addressed should keep its contents private. *Buffington* v. *Thomas*, 157.

2. SAME. *Request for answer. Contingency.*

An holographic will, in form a letter reciting that the testator was in bed, did not know that he would live until the next day, and requesting an answer from the person to whom it was addressed, is not dependent upon a contingency, although it was never answered and the testator lived several months after writing it. *Ib.*

HOMESTEADS.

1. DOUBLE CLAIM.

A defendant in execution after abandoning his homestead in one tract of land and securing the same in another tract, cannot again defeat the execution by selling the last mentioned tract and returning to the first one claiming a homestead therein. *Brantley* v. *Batson*, 411.

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...ion. *Widow's right. Parti-*
MUNICIPALITIES. ... *amended Laws* 1900, *p.* 129.

The governor may ap...
municipalities, since ... ended Laws, 1900, p. 129, and Code
authorizing the go... subject, exempt property, real and per-
the incorporation ... husband descends to his widow and chil-
porated, is con... *per stirpes* the share of deceased chil-
tions belong... common; but the widow has the right to occupy
under Con... freed from liability for rent or hire and from
pass gen... her widowhood. *Martin* v. *Martin*, 553.
v. *Whi...*

HUSBAND AND WIFE.

FOREIGN ... *Emancipation. Code* 1871, § 2323. *Code* 1880, § 1167.
A ... *Constitution* 1890, *sec.* 94. *Code* 1892, § 2289.

Code 1871, § 2323, providing that no act of the husband should affect the wife's interest in land, ceased to be operative when married women were wholly emancipated from all disability on account of coverture. Code 1880, § 1167; Constitution 1890, sec. 94; Code 1892, § 2289. *Southworth* v. *Brownlow*, 405.

2. ESTATE OF DECEDENT. *Witnesses. Competency. Code* 1892, § 1740. *Husband and wife. Ante-nuptial contract.*

Where a married woman died leaving a will and the surviving husband sought under the statute, Code 1892, § 4496, to renounce the will and take a share of her estate, in opposition to which was pleaded an ante-nuptial contract empowering the wife to dispose of her property by will as she should see proper, the husband was incompetent as a witness to impeach the contract as a forgery, under Code 1892, § 1740, providing that a person shall not testify to establish his own claim against the estate of a decedent. *Watson* v. *Duncan*, 763.

3. PARTITION.

That the husband of a co-tenant occupied the joint estate with her, and that he, under the law, is the recognized head of the family, did not limit her liability for compensation to the other co-tenants for her use and occupation of the estate. *Walker* v. *Williams*, 392.

ILLINOIS CENTRAL RAILROAD COMPANY.

CONSTRUCTION OF LEASE TO UNDER LAWS 1882, p. 1023.

Canton v. *Canton, etc., Warehouse Co.*, 268.

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IMPROVEMENTS.

See PARTITION, 1.

Bennett v. *Bennett*, 493.

See VENDOR AND VENDEE, 5, 6.

British, etc., Mortgage Co. v. *Todd*, 522.

INFANTS.

CONTRACTS. *Misrepresentation of age. Estoppel. Mortgage. Necessaries.*

Where a borrower obtained a loan of money on the faith of his representation that he was an adult, he cannot defeat a mortgage given to secure the loan because of his infancy at the time, especially where the money was used by him in the purchase of necessaries. *Ostrander* v. *Quin*, 230.

PARENT AND CHILD. *Domicile.*

The domicile of a father is the domicile of his infant children.

INHERITANCE.

WITNESSES. *Estates of decedents. Evidence. Code* 1892, § 1740.

The testimony of the heirs of the husband to a contract between him and his wife, made shortly before and in contemplation of their marriage, to the effect that the surviving husband or wife should take only a life estate in the property of the other, is not incompetent against the estate of the wife under Code 1892, § 1740, providing that no one shall testify to establish his own claim against the estate of a decedent which originated in the lifetime of the deceased, since in such case the question is one of inheritance and not a claim which originated in the lifetime of the wife. *Steen* v. *Kirkpatrick*, 63.

INJUNCTIONS.

See PROCESS.

Sheffield v. *Friedberg*, 188.

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INSANITY.

1. HOMICIDE. *Instruction.*

In a prosecution for homicide, a requested instruction that if the defendant received a blow on his head which affected his mind to some extent, and that, when under excitement or anger, such affection caused him to lose mental control of himself, together with mental control of his power to distinguish between right and wrong, and that, at the time of the killing, defendant was laboring under great mental excitement, and entertained no malice toward deceased, but merely wished to protect himself, and that the affection of his mind produced a mental delusion magnifying the extent of his danger, and that, while laboring under such delusion, and without malice, he shot and killed deceased, or, if the jury had a doubt as to the truth of such facts, they should acquit defendant, was properly refused, as improperly drawn, and on the weight of evidence. *Tidwell* v. *State,* 475.

2. SAME.

An instruction in a prosecution for homicide that if defendant's mind was measurably impaired by a blow on his head, and, while ordinarily sane, his mind would become so disordered under excitement as to cause him to lose power to distinguish between right and wrong, and was laboring under such disorder at the time of firing the fatal shot, and magnified, through a delusion, the danger to which he was exposed, and, without malice, and with a perfectly sincere belief that he was in immediate danger of death at the hands of deceased, fired the fatal shot, he should be acquitted, was properly refused, as an inaccurate statement of the law, and on the weight of evidence. *Tidwell* v. *State,* 475.

3. SAME. *Evidence of wastefulness.*

In a prosecution for homicide, evidence that defendant would spend his substance in purchasing articles for which he had no special use, and that he neglected to provide for the future support of his family, did not constitute proof of insanity. *Ib.*

INSTRUCTIONS.

1. ALREADY GIVEN.

It is not error to refuse an instruction the substance of which has already been given in another instruction. *Schrader* v. *State,* 593.

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INSTRUCTIONS—*Continued.*

2. ERRONEOUS. *When not harmless. Conflicting evidence.*

Erroneous instructions, calculated to mislead the jury, are not harmless where the testimony would support a verdict for either party. *Brister* v. *Illinois, etc., R. R. Co.*, 33.

3. EVIDENCE. *Want of. Weight of.*

Instructions in a criminal case, as well as a civil one, should be refused if they be upon the weight of the evidence or if there be no evidence of which to predicate them. *Tidwell* v. *State*, 475.

See INSANITY, 1, 2, 3.

Tidwell v. *State*, 475.

4. FIRES. *Contributory negligence. Insurance.*

In a suit brought by the owner of property destroyed by fire for the use of insurance companies, subrogated to the owner's rights, against a railroad company for negligently causing the fire, where the testimony would support a verdict for either party, instructions for the defendant are erroneous:

(*a*) Which authorize a finding on only a part of the evidence, ignoring the balance; or

(*b*) Which assume the negligence of the owner, the evidence being conflicting on the subject; or

(*c*) Which, propounding the plaintiff's contributory negligence as a defense, omit from the conception of it the element of proximate cause; or

(*d*) Which, propounding said defense, fail to predicate the owner's contributory negligence of knowledge that there was danger to be guarded against. *Brister* v. *Illinois, etc., R. R. Co.*, 33.

5. MURDER. *Code* 1892, § 1149.

An instruction purporting to define murder under the statute, Code 1892, § 1149, which excludes the statutory words "without authority of law," is erroneous. *Ivy* v. *State*, 264.

6. SAME.

Where the defendant shot and killed the deceased he is not entitled to an instruction telling the jury to acquit if they believe from the evidence that defendant insulted and struck deceased and thereupon deceased shot defendant and defendant then killed deceased, failing to negative the idea that defendant provoked the difficulty with intent to overcome deceased. *Schrader* v. *State*, 593.

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INSTRUCTIONS—*Continued.*

7. MURDER. *Self-defense. Instruction. Abandonment of intent to kill.*

In a murder case it is error to give an instruction for the state denying defendant the right of self-defense if he armed himself with a deadly weapon and provoked the difficulty with intent to kill deceased, there being testimony tending to show that defendant abandoned the intent to kill before slaying the deceased and that the killing was in self-defense. *Jones* v. *State*, 194.

8. SAME. *Satisfaction of jurors' minds and consciences. Reasonable doubt.*

An instruction authorizing the conviction of a defendant if the minds and consciences of the jury are fully satisfied of his guilt is erroneous; the jury should not convict unless satisfied of a defendant's guilt beyond every reasonable doubt arising from the evidence. *Ib.*

INSURANCE.

EQUITY. *Jurisdiction. Multiplicity of suits. Inadequacy of legal remedy.*

Where property destroyed by fire was insured in three insurance companies, the policies containing substantially the same provisions, and the owner brought three separate suits at law, one against each company, demanding the face of each policy, and the companies filed the same pleas setting up the same defenses, a bill in equity will lie by the companies to restrain the suits at law requiring the suits to be tried in equity, on the grounds of preventing a multiplicity of suits and the inadequacy of the remedy at law. *Tisdale* v. *Three Insurance Companies*, 709.

INTEREST.

See VENDOR AND VENDEE, 4.

British, etc., Mortgage Co. v. *Todd*, 522.

See ESTATES OF DECEDENTS, 5.

Owens v. *Owens*, 673.

INTERSTATE COMMERCE.

1. AGREEMENT AS TO RATES. *Discrimination. Code* 1892, §§ 4287, 4290.

A contract by a railroad company to maintain rates from a factory, not exceeding to competitive points the rates from other factory towns,

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Interstate Commerce.

INTERSTATE COMMERCE—*Continued.*

is not on its face void for discrimination, under the Interstate Commere Act of February 4, 1887, 24 Statutes at Large, 379; nor Code 1892, §§ 4287, 4290. *Laurel Mills* v. *Gulf, etc., R. R. Co.*, 339.

2. AGREEMENT AS TO RATES. *Milling in transit.*

A contract by a railroad company to credit to freight charges on manufactured goods any freight received on raw material shipped to the factory, is a milling-in-transit agreement, and does not violate the statutes mentioned above. *Ib.*

3. SAME. *Code* 1892, § 4290.

The Interstate Commerce Act, sec. 6, and Code 1892, § 4292, providing for the publication by railroads of schedules of rates and forbidding deviations therefrom, do not render invalid a contract by a railroad company to charge no greater rate from a factory to competitive points than is charged from other places, nor prohibit the maintaining of a milling-in-transit agreement, in the absence of any showing that the rates fixed by the contract were different from the approved rates, or that any schedule of rates had been submitted to the commission at all before the contract was made. *Ib.*

4. SAME. *Approval of rates. Burden of proof.*

The burden is not on the plaintiff to show, in a suit against a railroad for breach of contract to transport freight at a specified rate, that the contracted rate had been filed with the Interstate Commerce Commission or approved by the State Railroad Commission, as required by the Interstate Commerce Act, and Code 1892, § 4292. *Ib.*

5. TAXATION. *Constitution* 1890, *sec.* 112. *Privilege tax. Lumber business. Exemption. Non-exporter. Constitution of the United States, art.* 1, *sec.* 8, *clause* 3. *Laws* 1900, *p.* 43, *ch.* 43, *sec.* 8.

The eighth section of the act of March 9, 1900 (Laws 1900, p. 43, ch. 43, sec. 8), purporting to impose a privilege tax "on each land timber mill company," etc., but excepting therefrom sawmill operators who do not ship timber or lumber out of the state, is unconstitutional, in that it violates:

(*a*) Constitution 1890, sec. 112, declaring that taxation shall be uniform and equal; and

(*b*) Constitution of the United States, art. 1, sec. 8, par. 3, giving congress power to regulate commerce between the states, since it seeks to impose a tax on interstate commerce. *Adams* v. *Mississippi Lumber Co.*, 23.

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INTRUDER.

See EJECTMENT.

Anderson v. *Moore*, 400.

JEOFAILS, STATUTE OF.

PLEADING. *Sufficiency of declaration. Code* 1892, § 746.

Under Code 1892, § 746, providing that a judgment shall not be reversed after verdict for any mistake or misconception of the form of action, or for any other defect of form in the declaration, an objection to plaintiff's right to recover because of an insufficiently stated cause, and not her right to recover on a properly stated cause, is an objection to the form of pleading, which must be seasonably interposed in the trial court. *Yazoo, etc., R. R. Co.* v. *Schraag*, 125.

JEOPARDY.

1. CRIMINAL LAW. *Autrefois convict. Constituent crime. Misdemeanor. Felony.*

The conviction of a defendant by a justice of the peace of a misdemeanor is not a bar to an indictment for a felony of which the misdemeanor is a constituent; such a conviction for an assault and battery does not bar an indictment for an assault and battery with intent to kill and murder predicated of the same acts. *Huffman* v. *State*, 479.

2. SAME. *Code* 1892, § 1340. *Constitutional law. Constitution* 1890, *sec.* 22. *Jeopardy.*

Code 1892, § 1340, providing that the conviction of a defendant by a justice of the peace for a misdemeanor shall not bar a prosecution for a felony in the same matter, is not violative of Constitution 1890, sec. 22, declaring that a person shall not be twice placed in jeopardy for the same offense. *Ib.*

JUDGMENTS.

1. BOARD OF SUPERVISORS. *Collateral attack.*

Defects in the proceedings and judgments of a board of supervisors, not jurisdictional in their nature, are unavailing in a collateral proceeding to defeat the action of the board. *Hinton* v. *Perry County*, 536.

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JUDGMENTS—*Continued.*

2. BOARD OF SUPERVISORS. *Limited jurisdiction. What record to show.*

In matters in which the board of supervisors have limited jurisdiction its record must show jurisdictional facts, but need not set out the evidence thereof. *Hinton* v. *Perry County,* 536.

3. SAME. *Fraud. Corruption.*

Any judgment of the board of supervisors may be attacked on the ground of fraud or corruption when seasonably set up and pleaded. *Ib.*

4. JUSTICE OF THE PEACE. *Suit on. Code* 1892, § 2395.

A suit upon a judgment rendered by a justice of the peace is properly brought, under Code 1892, § 2395, regulating the venue of actions in justices' courts, before a justice of the peace of the district of defendant's residence, although the judgment sued upon was rendered by another justice of the peace of a different district. *Wise* v. *Thread,* 200.

5. ENROLLMENT. *Code* 1892, § 2413.

A judgment of a justice of the peace may be enrolled in any county upon compliance with Code 1892, § 2413, providing for such enrollment on filing an abstract of the judgment with the clerk of the circuit court. *Ib.*

6. SAME. *Suit upon. Loss of record. Evidence. Code* 1892, § 1792. *Laws* 1896, *p.* 108.

In an action upon a judgment rendered by a justice of the peace a certified copy of the judgment roll is admissible in evidence, under Code 1892, § 1792, as amended, Laws 1896, p. 108, making such certificate competent evidence of enrollment, the records of the justice of the peace who rendered the judgment having been destroyed. *Ib.*

JUDICIAL DISTRICTS IN COUNTIES.

CONSTITUTION 1890, SECS. 152, 259, 260. *New counties. Judicial districts. County seats.*

The subject of legislative power to create new counties, divide counties into judicial districts, and remove seats of justice of such districts discussed. *Hinton* v. *Perry County,* 536.

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JURIES.

1. CRIMINAL LAW. *Murder. New trial.*

If a juror on his *voir dire* states that he had formed and expressed an opinion as to the guilt of the accused, but that his opinion was not fixed and would not affect his verdict, and the accused does not offer to challenge him either for cause or peremptorily—his peremptory challenges not having been exhausted—he will not after conviction be granted a new trial because the juror had before being empaneled expressed the opinion that the accused ought to be convicted. *Schrader* v. *State,* 593.

2. SAME. *Special venire. Code* 1892, § 2389.

If an impartial jury be obtained in a murder case, the defendant cannot, after conviction, predicate error of an irregularity in the drawing of a special venire, since the statutes on the subject (Code 1892, § 2389) are directory. *Buchanan* v. *State,* 332.

JURISDICTION.

See PARTITION, 2.

Walker v. *Williams,* 392.

See BOARD OF SUPERVISORS, 3, 4.

Hinton v. *Perry County,* 536.

See INSURANCE.

Tisdale v. *Three Insurance Companies,* 709.

JUSTICES OF THE PEACE.

1. CIRCUIT COURT. *Appeal. Notice.*

Upon appeal from the judgment of a justice of the peace to the circuit court it is unnecessary to give notice of the appeal to the adverse party. *Rowe* v. *Cannon,* 101.

2. SAME. *Code* 1892, §§ 82, 84.

The execution of the appeal bond in such case, as required by Code 1892, § 82, and the transmission of the record to the circuit court, as required by Code 1892, § 84, has the effect of continuing the pendency of the suit. *Ib.*

3. SAME. *Code* 1892, § 3417.

Code 1892, § 3417, providing for the issuance of a summons upon the institution of a suit in the circuit court, has no application to a case appealed from a justice of the peace. *Ib.*

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JUSTICES OF THE PEACE—*Continued.*

4. CIRCUIT COURT. *Dismissal. Amount of judgment.*

A plaintiff causing defendant's defective appeal to the circuit court to be dismissed is only entitled, upon defendant's failure to perfect the appeal, to a judgment in the sum for which the justice's court gave judgment, with interest and statutory damages, although the plaintiff's demand was for a larger sum. *Jacobs* v. *Johnson*, 450.

5. JUDGMENTS. *Suit on judgment. Code* 1892, § 2395.

A suit upon a judgment rendered by a justice of the peace is properly brought, under Code 1892, § 2395, regulating the venue of actions in justices' courts, before a justice of the peace of the district of defendant's residence, although the judgment sued upon was rendered by another justice of the peace of a different district. *Wise* v. *Thread*, 200.

6. SAME. *Enrollment. Code* 1892, § 2413.

A judgment of a justice of the peace may be enrolled in any county upon compliance with Code 1892, § 2413, providing for such enrollment on filing an abstract of the judgment with the clerk of the circuit court. *Ib.*

7. SAME. *Loss of record. Evidence. Code* 1892, § 1792. *Laws* 1896, *p.* 108.

In an action upon a judgment rendered by a justice of the peace a certified copy of the judgment roll is admissible in evidence, under Code 1892, § 1792, as amended, Laws 1896, p. 108, making such certificate competent evidence of enrollment, the records of the justice of the peace who rendered the judgment having been destroyed. *Ib.*

LAND.

See EJECTMENT.

Anderson v. *Moore*, 400.

LANDLORD AND TENANT.

1. FARMING ON SHARES.

If the owner of a farm furnishes the land, team, and farm implements and feeds the team, and another furnishes the labor to make and gather the crops, to be divided between them, the relation between them is that of landlord and tenant. *Alexander* v. *Zeigler*, 560.

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Landlord and tenant.

LANDLORD AND TENANT—*Continued.*

2. DEED OF TRUST. *Waiver of lien. Advances to tenant.*

A landlord who waives his lien to the extent of a designated sum in order that the tenant may secure advances from another by executing a deed of trust on his crops to be grown on the leased premises, cannot escape the effect of the waiver because the deed of trust recited that the advances were to be used also in making a crop on other lands, and did not expressly require advances to the full extent of the waiver. *Dreyfus* v. *Gage*, 219.

3. DISPOSSESSION. *Termination of tenancy. Notice to quit. Code* 1892, § 2544.

Where land is leased by the month, to continue for an indefinite period, the tenancy can only be terminated at the end of a monthly term upon one week's previous notice in writing, under Code 1892, § 2544, providing for one week's notice in writing in order to terminate a lease by the month. *Wilson* v. *Wood*, 728.

4. SAME. *Summary proceedings to remove tenant. Nonpayment of rent. Code* 1892, § 2547.

In order for a landlord to succeed in a suit to summarily remove his tenant from leased premises for the nonpayment of rent, under Code 1892, §§ 2547, *et seq.*, so providing, it is necessary for the affidavit and proof to show:

(*a*) That the rent was past due and unpaid.

(*b*) That three days' notice in writing requiring payment had been given to the tenant; and

(*c*) That the rent could not be made by distress of the tenant's goods. *Ib.*

5. TENANT HOLDING OVER. *Expiration of term. Summary proceeding to remove. Code* 1892, §§ 2547, 2548. *Affidavit.*

An affidavit in a proceeding by a landlord to remove a tenant holding over after the expiration of his term, under Code 1892, § 2547, providing a speedy remedy for such case, is defective if it fail to allege facts, as required by Code 1892, § 2548, from which the court may determine that the relation of landlord and tenant existed between the parties and that the term has expired. *Bowles* v. *Dean*, 376.

6. SAME. *Amendment. Code* 1892, § 717.

Such a proceeding should not be dismissed because of a defective affidavit, unless the landlord declines to amend, as he has a right to do under Code 1892, § 717, authorizing amendments in pleadings and proceedings. *Ib.*

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LANDLORD AND TENANT—*Continued.*

7. TENANT HOLDING OVER. *Appeal to circuit court. Code* 1892, § 2552. *Counter affidavit. Issue made in circuit court.*

The defendant in such a proceeding may, upon appeal, file his counter affidavit (Code 1892, § 2552) in the circuit court. *Bowles* v. *Dean*, 376.

LAWS (OTHER THAN CODE SECTIONS) CONSTRUED.

Laws 1884, ch. 172, p. 182. *Means* v. *Haley*, 550.
Laws 1888, ch. 23, p. 41. *Means* v. *Haley*, 550.
Laws 1894, ch. 78, p. 77. *Tate* v. *Levee Commissioners*, 388.
Laws 1896, ch. 87, p. 97. *Yazoo, etc., R. R. Co.* v. *Schraag*, 125
Laws 1898, ch. 5, p. 14. *Tate* v. *Levee Commissioners*, 388.
Laws 1898, ch. 66, p. 84. *Yazoo, etc., R. R. Co.* v. *Schraag*, 125.
Laws 1900, ch. 43, p. 43. *Adams* v. *Mississippi Lumber Co.*, 23.
Laws 1902, ch. 123, p. 172. *Hinton* v. *Perry County*, 536.

LAWYER'S FEES.

See ESTATES OF DECEDENTS, 17.

Dobbs v. *Chandler*, 372.

See PARTITION, 4.

Walker v. *Williams*, 392.

See ATTORNEY AND CLIENT, 1, 2, 3, 4.

Clifton v. *Clark*, 795.

Halsell v. *Turner*, 432.

See BOARD OF SUPERVISORS, 1.

Hinton v. *Perry County*, 536.

LEVEE BOARD.

See LIQUIDATING LEVEE BOARD.

Mitchell v. *Bond*, 72.

LICENSEE.

See RAILROADS, 29.

Yazoo, etc., R. R. Co. v. *Metcalf*, 242.

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LIENS.

1. ATTORNEY AND CLIENT. *Attorney's lien. Extent.*

An attorney has a lien on the funds of his client for services rendered in the proceedings by which the money was collected, but not for services rendered in other cases. *Halsell* v. *Turner*, 432.

2. SAME. *Exemptions. Wages. Code* 1892, § 1963, *par.* 10 (*a*).

Money collected by an attorney on a claim due his client for wages, exempt from execution or garnishment under Code 1892, §1963, par. tenth (a), is not exempt from the attorney's lien. *Ib.*

3. PARTITION. *Taxes. Improvements. Rents.*

In a suit for partition of land a tenant in common is entitled to a lien on the shares of his co-tenants in the land for taxes paid by him beyond his proportionate share, and for any sum due him for improvements or rent from his co-tenants. *Bennett* v. *Bennett*, 493.

LIFE INSURANCE.

1. ESTATE OF DECEDENTS. *Last illness. Nursing. Code* 1892, § 1965. *Exemption.*

A claim for nursing a decedent in his last illness is a debt against him, and the proceeds of a life insurance policy, exempt from the debts of the decedent under Code 1892, § 1965, is not chargeable therewith. *Dobbs* v. *Chandler*, 372.

2. SAME. *Funeral expenses. Attorney's fees. Code* 1892, § 1957.

The funeral expenses of a decedent and an administrator's attorney's fee for the conduct of the administration are not debts against him, and the administrator of the estate may pay the same with the proceeds of a life insurance policy which is exempt from liability for his debts. *Ib.*

LIMITATION OF ACTIONS.

See STATUTE OF LIMITATIONS, 1, 2, 3, 4, 5, 6, 7.

Mitchell v. *Bond*, 72.
Chambliss v. *Wood*, 209.
Fowlkes v. *Lea*, 509.
Moore v. *Crump*, 612.
Gordon v. *McDougall*, 715.

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LIMITATION OF ESTATES.

See ESTATES TAIL.

Middlesex Banking Co. v. *Field*, 646.

LIQUIDATED DAMAGES.

A stipulation in a contract that in case of a failure to deliver an engine on a certain day defendant would "pay as forfeit five dollars per day for each day behind this time" was intended to provide for liquidated damages and was not designed as a penalty. *Hardie-Tynes, etc., Co.* v. *Glen-Allen, etc., Mill*, 259.

LIQUIDATING LEVEE BOARD.

TAX SALE. *Lands held by levee board.*

While lands belonged to the board of liquidating levee commissioners, under a valid tax sale for levee taxes, they were not subject to be again sold for levee taxes, and if so resold, no title is thereby conveyed. *Mitchell* v. *Bond*, 72.

LOSS OF RECORDS.

SUIT UPON JUDGMENT. *Evidence. Code* 1892, § 1792. *Laws* 1896, *p.* 108.

In an action upon a judgment rendered by a justice of the peace a certified copy of the judgment roll is admissible in evidence, under Code 1892, § 1792, as amended, Laws 1896, p. 108, making such certificate competent evidence of enrollment, the records of the justice of the peace who rendered the judgment having been destroyed. *Wise* v. *Thread*, 200.

MARRIAGE.

STATUTE OF FRAUDS. *Code* 1892, § 4225, *par. b. Consideration of marriage. Contemplation of marriage.*

An agreement, made in contemplation of marriage after the contract to marry has become binding, is not an agreement in consideration of marriage within the meaning of the statute of frauds (Code 1892, § 4225, par. b), providing that an action shall not be brought whereby to charge a defendant upon any oral agreement made upon consideration of marriage. *Steen* v. *Kirkpatrick*, 63.

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MARRIED WOMEN.

COVERTURE. *Emancipation. Code* 1871, § 2323. *Code* 1880, § 1167. *Constitution* 1890, *sec.* 94. *Code* 1892, § 2289.

Code 1871, § 2323, providing that no act of the husband should affect the wife's interest in land, ceased to be operative when married women were wholly emancipated from all disability on account of coverture. Code 1880, § 1167; Constitution 1890, sec. 94; Code 1892, § 2289. *Southworth* v. *Brownlow*, 405.

MASTER AND SERVANT.

See RAILROADS, 23, 24, 25, 26, 30, 31.

Yazoo, etc., R. R. Co. v. *Schraag*, 125.
Illinois, etc., R. R. Co. v. *Abrams*, 456.

MEASURE OF DAMAGES.

See DAMAGES, 2, 3, 4, 5, 6, 7, 8, 9, 10.

Alabama, etc., Ry. Co. v. *Livingston*, 1.
American Cotton Oil Co. v. *Herring*, 693.
Western, etc., Co. v. *Spratley*, 86.
Cocke v. *Western, etc., Co.*, 380.
Mortgage Co. v. *Todd*, 522.
Holloway v. *Miller*, 776.

MILLING IN TRANSIT.

A contract by a railroad company to credit to freight charges on manufactured goods any freight received on raw material shipped to the factory, is a milling-in-transit agreement, and does not violate the interstate commerce act nor Code 1892, §§ 4287, 4290. *Laurel Mills* v. *Gulf, etc., R. R. Co.*, 339.

MESNE PROFITS.

See VENDOR AND VENDEE, 5.

Mortgage Co. v. *Todd*, 522.

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MORTGAGES.

See INFANTS, 1.

Ostrander v. *Quin*, 230.

MULTIPLICITY OF SUITS.

See EQUITY, 1.

Tisdale v. *Three Insurance Companies*, 709.

MUNICIPALITIES.

1. APPEALS. *Judicial acts. Code* 1892, § 79.

Under Code 1892, § 79, providing that on appeal from the mayor and board of aldermen of a municipality the circuit court shall hear and determine the case "as presented by the bill of exceptions as an appellate court," it is not competent for the court to consider oral testimony even by agreement of the parties, although the witnesses be none other than those examined before the municipal authorities. *Greenwood* v. *Henderson*, 802.

2. CORPORATIONS. *Contracts. Police power. Evasion of.*

Where a warehouse company contracted to furnish a railroad company water through conduits, but was without power to construct and maintain the same across the streets of the city in which the water was to be delivered, a subsequent agreement by which the railroad company, having such power, undertook to construct them, is not an illegal evasion of the police power of the city. *Canton* v. *Canton, etc., Warehouse Co.*, 268.

3. INCORPORATION. *Code* 1892, § 2921. *Laws* 1898, *p.* 90. *Constitutional law. Constitution* 1890, *sec.* 88. *Executive and legislative power.*

Code 1892, § 2921, Amended Laws 1898, p. 90, authorizing the governor to pass upon and approve applications for the incorporation of cities, towns, and villages not previously incorporated, is constitutional, and does not submit to the executive questions belonging to the legislative department of the government, under Constitution 1890, sec. 88, providing that the legislature shall pass general laws for the incorporation of municipalities. *Jackson* v. *Whiting*, 163.

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Municipalities.

MUNICIPALITIES—*Continued.*

4. INCORPORATION. *Annexation of territory. Separate incorporation of adjacent territory. Code* 1892, §§ 2912a, 2913. *Laws* 1902, *p.* 154. *Code* 1892, § 2921. *Laws* 1898, *p.* 90.

Where a municipality initiates proceedings by the passage of an ordinance for the annexation of adjacent unincorporated territory under Code 1892, § § 2912a, 2913, Amended Laws 1902, p. 154, authorizing the same, but providing that the ordinance should not become operative until published for thirty days, etc., and the electors of the territory sought to be annexed begin proceedings about the same time to form a separate municipality embracing the same territory, under Code 1892, § 2921, Amended Laws 1898, p. 90, authorizing the same to be done on three weeks' notice, and the governor approves of the separate municipality before the city ordinance becomes operative, that one of the two proceedings will be treated as effectual and prevailing over the other in which the initial steps were first taken. *Jackson* v. *Whiting,* 163.

5. SAME. *Appeal. Issue in circuit court. Time.*

The question whether a contemplated extension or contraction of the limits of a municipality be or be not reasonable, which is to be tried on an issue to be made up on an appeal to the circuit court from an ordinance proposing the same under Code 1892, § § 2912a, 2913, Amended Laws 1902, p. 154, authorizing such procedure and appeal and providing for such issue, is to be determined by the facts and circumstances at the time of the adoption of the ordinance. *Ib.*

6. SAME. *Striking issues from files.*

Where a municipality, upon appeal from its ordinance proposing the annexation of adjacent territory, tendered in the circuit court the statutory issue, averring that the annexation proposed by its ordinance was reasonable, it was error to strike the issue so tendered from the files on a mere inference that the territory sought to be annexed was incorporated territory at the time the ordinance was adopted. *Ib.*

7. SAME. *Code* 1892, § 2921. *Laws* 1898, *p.* 90. *Petition for charter. Governor's power and duty.*

In acting on a petition, under Code 1892, § 2921, Amended Laws 1898, p. 90, providing for the incorporation of unincorporated hamlets, the governor is required only to determine whether or not the petition is sufficient and sufficiently signed and whether it has been published as required by the statute. If these questions be resolved affirmatively, he is required to issue his proclamation of incorpora-

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MUNICIPALITIES—*Continued.*

tion and is without power to enlarge or contract the proposed municipality. *Jackson* v. *Whiting*, 163.

8. LEGISLATIVE ORDINANCE. *Self-executing. Laws* 1860, *p.* 304, *ch.* 261, *sec.* 4.

Where by act of the legislature (Laws 1860, p. 304) it is provided that "all offenses against the criminal laws of this state occurring in the limits of a designated city, not amounting to a felony, shall be deemed violations of the ordinances of the city and punishable as such," it is unnecessary to the prosecution of a party charged thereunder that the city should have enacted an ordinance covering the case, since the legislative act is independent of the city's action. *Chrisman* v. *Jackson*, 787.

9. SAME. *Codification of ordinances. Code* 1892, § 3010.

Proof of a compilation of the existing ordinances of a city and their codification, under Code 1892, § 3010, authorizing such codification, after the adoption by the city of the code chapter on municipality (Code 1892, ch. 93), is evidence that an ordinance therein contained is duly in force. *Ib.*

10. SAME. *Coming under code. Ordinances.*

When a city, town, or village comes under the code chapter on municipalities (Code 1892, chap. 93), it is not required to republish its ordinances. *Ib.*

11. RAILROADS. *Lease. Laws* 1882, *p.* 1023, *sec.* 2. *Illinois Central Railroad Company.*

The lease, executed under Laws 1882, p. 1023, sec. 3, authorizing the Illinois Central Railroad Company, a foreign corporation, to lease the Chicago, St. Louis & New Orleans Railroad Company and other domestic railroad companies, invested the lessee, the foreign company, with all the power and franchises of the lessor companies. *Canton* v. *Canton, etc., Warehouse Co.*, 268.

12. SAME. *Public road or way. Streets.*

A railroad company having power, granted by the legislature, to cross any "public road or way" has the right to cross streets as well as country roads. *Ib.*

13. SAME. *Legislative power over. Streets.*

The legislature may divest a municipality of control over its streets and authorize their use by a corporation without compensating the municipality. *Ib.*

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Municipalities.

MUNICIPALITIES—*Continued.*

14. STREETS. *Railroads. Conduits across streets. Right of way.*

A railroad company, having the right to do all acts incidental to the maintenance of its railroad, may lay conduits under the surface of its right of way to conduct water to its buildings, although in so doing the conduits pass under the streets of a municipality. *Canton* v. *Canton, etc., Warehouse Co.*, 268.

15. SAME. *Temporary obstruction of street. Nuisance.*

A temporary and partial obstruction of a street by a railroad company in laying conduits across it in its right of way is not a nuisance which can be enjoined. *Ib.*

16. SAME. *Eminent domain. Foreign corporation.*

A foreign railroad corporation, having the right to do all acts incidental to the maintenance of its railroad, will not be denied the right to lay conduits under its right of way across streets, because it has no right to exercise the power of eminent domain. *Ib.*

17. STREETS. *Additional servitudes. Abutting owner. Compensation.*

The owner of land abutting on a street, whether he own the fee to the street or it be in the municipality, is entitled to compensation for any additional servitude placed on his property by any use of the street not incidental or necessary to its enjoyment as a street by the public. *Hazlehurst* v. *Mayes*, 7.

18. SAME. *Lights. Code* 1892, § 2947. *Trimming shade trees.*

But a municipality may, without compensating the abutting owner, under Code 1892, § 2947, giving it full jurisdiction over streets with power to light them, trim trees standing between the sidewalk and the street to any extent necessary to prevent interference with the wires of an electric light plant erected by it. *Ib.*

19. SAME. *Code* 1892, § 2945. *Closing. Compensation. Abutting property owners.*

Code 1892, § 2945, empowering municipalities to close and vacate streets, does not dispense with the necessity of compensating abutting property owners. *Laurel* v. *Rowell*, 435.

20. SAME. *Constitutional law. Private property. Public use. Constitution* 1890, *sec.* 17.

Where a municipality closes and vacates an established street it deprives the owners of abutting lots of a right, which is property, and which cannot be taken except on due compensation being first made, under Constitution 1890, sec. 17, regulating the taking of private property for public use. *Ib.*

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MUNICIPALITIES—*Continued.*

21. SURVEYS. *Town lots. Plats. Failure to record. Sales. Penalty. Code* 1892, § 4403.

Code 1892, § 4403, imposing a penalty for selling lots in a municipality, or subdivision thereof or addition thereto, thereafter laid out, without first having a plat thereof prepared and recorded, has no application to a municipality incorporated before it became operative nor to private surveys made before that time. *Wellborn* v. *Muller*, 726.

MURDER.

See CRIMINAL LAW AND PROCEDURE, 1, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 21, 22, 23, 24, 27, 28, 29, 30, 31, 32, 33, 34.

Pulpus v. *State*, 49.
Jones v. *State*, 194.
Ivy v. *State*, 264.
Buchanan v. *State*, 332.
Boyd v. *State*, 414.
Tidwell v. *State*, 475.
Schrader v. *State*, 593.
Thompson v. *State*, 758.

NECESSARIES.

See INFANTS, 1.

Ostrander v. *Quin*, 230.

NEGLIGENCE.

1. RAILROADS. *Passengers. Falling from train. Negligence.*

It is negligence for a passenger to voluntarily attempt to pass from one car to another while the train is running at a rapid rate of speed around a curve. *Dougherty* v. *Yazoo, etc., R. R. Co.*, 502.

2. SAME. *Coercion.*

If a passenger by coercion or direction of the railroad servants attempts to pass from one car to another of a train while running at a rapid rate around a curve and falls from the train, the question of his negligence is for the jury. *Ib.*

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NEGLIGENCE—*Continued.*

See CONTRIBUTORY NEGLIGENCE, 1, 2, 3, 4, 5, 6, 7, 8, 9.

Yazoo, etc., R. R. Co. v. *Metcalf*, 242.
Yazoo, etc., R. R. Co. v. *Schraag*, 125.
Brister v. *Illinois, etc., R. R. Co.*, 33.
Morehead v. *Yazoo, etc., R. R. Co.*, 112.
Western, etc., Co. v. *Spratley*, 86.

NEGOTIABLE INSTRUMENTS.

See BANKS AND BANKING.

Continental, etc., Bank v. *First National Bank, etc.*, 103.

NEW COUNTIES.

SUBJECT OF DISCUSSED.

Hinton v. *Perry County*, 536.

NOTICE.

See APPEALS, 2, 3.

Rowe v. *Cannon*, 101.

See DEEDS, 7.

Marx v. *Jordan*, 334.

See CARRIER, COMMON, 1, 2.

Gulf, etc., R. R. Co. v. *Horton*, 490.

NOTICE TO QUIT.

LANDLORD AND TENANT. *Dispossession. Termination of tenancy. Code* 1892, § 2544.

Where land is leased by the month, to continue for an indefinite period, the tenancy can only be terminated at the end of a monthly term upon one week's previous notice in writing, under Code 1892, § 2544, providing for one week's notice in writing in order to terminate a lease by the month. *Wilson* v. *Wood*, 728.

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NUISANCES.

TEMPORARY OBSTRUCTION OF STREET.

A temporary and partial obstruction of a street by a railroad company in laying conduits across it in its right of way is not a nuisance which can be enjoined. *Canton* v. *Canton, etc., Warehouse Co.*, 268.

NURSING.

See ESTATES OF DECEDENTS, 16.

Dobbs v. *Chandler*, 372.

ONUS PROBANDI.

See BURDEN OF PROOF.

Laurel Cotton Mills v. *Gulf, etc., R. R. Co.*, 339.

ORDINANCES.

1. MUNICIPALITIES. *Legislative ordinance. Self-executing. Laws* 1860, *p.* 304, *ch.* 261, *sec.* 4.

Where by act of the legislature (Laws 1860, p. 304) it is provided that "all offenses against the criminal laws of this state occurring in the limits of a designated city, not amounting to a felony, shall be deemed violations of the ordinances of the city and punishable as such," it is unnecessary to the prosecution of a party charged thereunder that the city should have enacted an ordinance covering the case, since the legislative act is independent of the city's action. *Chrisman* v. *Jackson*, 787.

2. SAME. *Codification of ordinances. Code* 1892, § 3010.

Proof of a compilation of the existing ordinances of a city and their codification, under Code 1892, § 3010, authorizing such codification, after the adoption by the city of the code chapter on municipality (Code 1892, ch. 93), is evidence that an ordinance therein contained is duly in force. *Ib.*

3. SAME. *Coming under code. Ordinances.*

When a city, town, or village comes under the code chapter on municipalities (Code 1892, ch. 93), it is not required to republish its ordinances.

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PARENT AND CHILD.

DOMICILE.

The domicile of a father is the domicile of his infant children. *Boyle* v. *Griffin*, 41.

PARTITION.

1. ACCOUNTING. *Improvements. Rents. Taxes. Lien.*

In a suit for partition of land:

(*a*) An occupying tenant in common is not liable to his co-tenants for rents, unless he has occupied more than his proportionate share of the land, and then only for the rent of the excess.

(*b*) A tenant in common is entitled to the cost of valuable, permanent, and not ornamental improvements put by him on the land in excess of his proportionate part thereof.

(*c*) A tenant in common is entitled to a lien on the shares of his co-tenants in the land for taxes paid by him beyond his proportionate share, and for any sum due him for improvements or rent from his co-tenants.

(*d*) A tenant in common who has improved a portion of the land equal in area to his proportionate share on partition in kind should have the same allotted to him.

(*e*) A tenant in common who has improved a portion of the land of greater value than his proportionate share is entitled to have the same allotted to him upon partition in kind, subject to contribution by him to his co-tenants.

(*f*) If the enquiry as to rents go behind the death of one under whom the co-tenants claim, an administrator of his estate may be made a party, unless administration be unnecessary. *Bennett* v. *Bennett*, 493.

2. JURISDICTION. *Code* 1892, § 3101. *Claims. Payment of liens. Taxes, use and occupation.*

In a partition suit, under Code 1892, § 3101, extending the jurisdiction of the chancery court in such cases, it is proper:

(*a*) To adjust all equities between the co-tenants relating to the common property and all questions arising between them from the discharge of liens and payment of taxes;

(*b*) To vacate a purchase by one of the co-tenants, under a mortgage upon the joint property, reimbursing the purchaser for money paid in discharging the lien;

(*c*) To reimburse one of the co-tenants for taxes paid by him on the joint property;

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PARTITION—*Continued.*

(*d*) To charge one of the co-tenants for the use and occupation of the joint property beyond the extent of his individual interest therein. *Walker* v. *Williams*, 392.

3. JURISDICTION. *Husband and wife.*

That the husband of a co-tenant occupied the joint estate with her, and that he, under the law, is the recognized head of the family, did not limit her liability for compensation to the other co-tenants for her use and occupation of the estate. *Ib.*

4. SAME. *Code* 1892, § 3119. *Solicitor's fee.*

The power to allow a solicitor fee in suits for partition, under Code 1892, § 3119, regulating the subject, should be exercised with caution and confined as nearly as possible to those cases in which there is no contest and no necessity for the defendants to have counsel of their own. When there is a real controversy and propriety in defendants being represented by their own counsel, they should not be required to contribute to pay counsel of their adversary. *Ib.*

See EXEMPTIONS, 1.

Martin v. *Martin*, 553.

PARTNERSHIP.

BANKRUPTCY. *Dissolution. Consent of creditors.*

Where, on the dissolution of a partnership, the retiring partner and all the creditors consenting thereto, the title to firm property was transferred to the partner who was to continue the business, and three months thereafter the continuing partner made disposition thereof and was adjudged a bankrupt, the right of his trustee in bankruptcy to sue for the property so disposed of by him cannot be defeated on the claim that the property was partnership property. *Thompson* v. *First National Bank*, 54.

PEREMPTORY INSTRUCTION.

OBJECTION TO REFUSAL. *Generality.*

The request by a defendant for a peremptory instruction, in an action for death resulting from collision, is too general as an objection to the declaration as insufficient to state a cause of action for failure to furnish competent servants. *Yazoo, etc., R. R. Co.* v. *Schraag*, 125.

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PASSENGER DEPOT.

See RAILROADS, 28, 29.

Yazoo, etc., R. R. Co. v. *Metcalf*, 242.

PASSENGERS.

1. RAILROADS. *Falling from train. Negligence.*

It is negligence for a passenger to voluntarily attempt to pass from one car to another while the train is running at a rapid rate of speed around a curve. *Dougherty* v. *Yazoo, etc., R. R. Co.*, 502.

2. SAME. *Coercion.*

If a passenger by coercion or direction of the railroad servants attempt to pass from one car to another of a train while running at a rapid rate around a curve and fall from the train, the question of his negligence is for the jury. *Ib.*

PERJURY.

See ATTEMPTS, 2.

State v. *Booker*, 187.

PLEADING.

1. DECLARATION. *Antagonistic causes of action. Same count.*

A declaration, with but one count, stating two antagonistic causes of action, will not sustain a verdict for plaintiff on either cause of action, where the jury were instructed in respect to both and it cannot be ascertained which of the instructions were controlling. *Illinois, etc., R. R. Co.* v. *Abrams*, 456.

2. MASTER AND SERVANT. *Railroads. Fellow-servants. Constitution* 1890, *sec.* 193. *Code* 1892, § 3559.

A cause of action predicated of the master's negligence, in failing to furnish his servant a safe place in which to work, is inconsistent and should not be joined in the same count with a cause of action arising from the negligence of a fellow-servant, based on Constitution 1890, sec. 193, and Code 1892, § 3559, modifying the common-law fellow-servant rule. *Ib.*

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Pleading.

PLEADING—*Continued.*

3. MASTER AND SERVANT. *Sufficiency.*

In an action for the death of an engineer, resulting from a collision with a switch engine, a declaration alleging that the switch engine was carelessly, recklessly, and negligently ordered out of the yards by the agent of the company, who was engaged in another department of labor, and made to proceed on a track which curved sharply around a high embankment at the time when a passenger train proceeding in the opposite direction was entitled to the use of the same track; that the collision was directly due to the reckless ordering out of the engine; that it was impossible for deceased who was the engineer on the passenger train to check the same after he saw the track was obstructed by another engine, which obstruction was, through the order of the agent, negligently allowed by defendant to be made on the track, is sufficient to sustain a recovery on the ground of negligence of the defendant in failing to furnish competent employes, where such negligence was established as that of a yardmaster whose authority to give the order characterized him as a superior agent of the company, and the declaration was not attacked on the trial, and defendant asserted deceased's contributory negligence was the only available defense. *Yazoo, etc., R. R. Co.* v. *Schraag,* 125.

4. SAME. *Sufficiency of declaration. Statute of jeofails. Code* 1892, § 746.

Under Code, 1892, § 746, providing a judgment shall not be reversed after verdict for any mistake or misconception of the form of action, or for any other defect of form in the declaration, an objection to plaintiff's right to recover because of an insufficiently stated cause, and not her right to recover on a properly stated cause, is an objection to the form of pleading, which must be seasonably interposed in the trial court. *Ib.*

5. MUNICIPALITIES. *Changing limits. Appeal. Issue in circuit court. Time.*

The question whether a contemplated extension or contraction of the limits of a municipality be or be not reasonable, which is to be tried on an issue to be made up on an appeal to the circuit court from an ordinance proposing the same under Code 1892, §§ 2912a, 2913, Amended Laws 1902, p. 154, authorizing such procedure and appeal and providing for such issue, is to be determined by the facts and circumstances at the time of the adoption of the ordinance. *Jackson* v. *Whiting,* 163.

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PLEADING—*Continued.*

6. MUNICIPALITIES. *Striking issues from files.*

Where a municipality, upon appeal from its ordinance proposing the annexation of adjacent territory, tendered in the circuit court the statutory issue, averring that the annexation proposed by its ordinance was reasonable, it was error to strike the issue so tendered from the files on a mere inference that the territory sought to be annexed was incorporated territory at the time the ordinance was adopted. *Jackson* v. *Whiting*, 163.

POISONING.

See CRIMINAL LAW AND PROCEDURE, 8, 9, 10, 11, 12, 13, 14, 15, 16.

Boyd v. *State*, 414.

POLICE POWER.

See CONTRACTS, 9.

Canton v. *Canton, etc., Warehouse Co.*, 268.

POSTAGE.

CLERK CHANCERY COURT. *Code* 1892, § 296. *Board of supervisors.*

It is the duty of the board of supervisors, under Code 1892, § 296, requiring it to furnish the county officers with necessary stationery, furniture, and "all other necessary articles," to furnish the necessary postage to be used in the official business of the clerk of the chancery court. *Downing* v. *Hinds County*, 29.

PRACTICE.

1. CHANCERY COURT. *Second deed. Procedure. Right to assail.*

Where, in a creditor's suit to cancel for fraud a deed made by his debtor, the court after hearing the cause announced its conclusion that the deed was void because of a defective description of the land, and, before final decree entered, the debtor executed a second deed perfecting the description, the cause should, on complainant's application, be remanded to the rules and complainant allowed to file a supplemental bill assailing the second deed. *Levy* v. *Royston*, 15.

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PRACTICE—*Continued.*

2. CIRCUIT COURT: APPEAL. *Justice's court. Dismissal. Amount of judgment.*

A plaintiff causing defendant's defective appeal to the circuit court to be dismissed is only entitled, upon defendant's failure to perfect the appeal, to a judgment in the sum for which the justice's court gave judgment, with interest and statutory damages, although the plaintiff's demand was for a larger sum. *Jacobs* v. *Johnson*, 450.

3. SAME. *Excluding all evidence. Rule.*

Upon a motion to exclude all the testimony, not only the facts expressly testified to, but all inferences necessarily and logically to be deduced therefrom, are to be taken as true, in favor of the party against whom such motion is interposed. *Alexander* v. *Zeigler*, 560.

4. SAME. *See* PLEADINGS, 5, 6.

Jackson v. *Whiting*, 163.

5. SUPREME COURT. *Demurrer erroneously sustained. No affirmance on facts.*

Where, in a suit by a trustee in bankruptcy to set aside a transfer of property made by the bankrupt, a demurrer was erroneously sustained to the bill and the same dismissed after evidence had been taken, the court on appeal will not affirm the judgment on the theory that the decision was correct, although made on the wrong grounds, there having been no decision on the evidence, but only on the pleadings. *Thompson* v. *First National Bank*, 54.

PRESUMPTION.

CONTRACTS. *Written and printed parts. Construction.*

It is to be presumed that the parties intended a contract to include all of its words and phrases, and this requires that the written and printed parts of an instrument should be reconciled, if it can be done. *Hardie-Tynes, etc., Co.* v. *Glen-Allen, etc., Mill*, 259.

PRIVILEGE TAXES.

1. TAXATION. *Constitution* 1890, *sec.* 112. *Lumber business. Exemption. Non-exporter. Interstate commerce. Constitution of the United States, art.* 1, *sec.* 8, *clause* 3. *Laws* 1900, *p.* 43, *ch.* 43, *sec.* 8.

The eighth section of the act of March 9, 1900 (Laws 1900, p. 43, ch. 43, sec. 8), purporting to impose a privilege tax "on each land timber mill company," etc., but excepting therefrom sawmill operators

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PRIVILEGE TAXES—*Continued.*

who do not ship timber or lumber out of the state, is unconstitutional, in that it violates:

(*a*) Constitution 1890, sec. 112, declaring that taxation shall be uniform and equal; and

(*b*) Constitution of the United States, art. 1, sec. 8, par. 3, giving congress power to regulate commerce between the sates, since it seeks to impose a tax on interstate commerce. *Adams* v. *Mississippi Lumber Co.*, 23.

2. COTTON SEED OIL MILLS. *Laws* 1898, *ch.* 5, *p.* 14. *Repeal. Laws* 1894, *ch.* 78, *p.* 77.

Laws 1898, ch. 5, p. 14, relieving cotton seed oil mills having a capital of less than thirty thousand dollars from a privilege tax, relates only to such tax for state purposes, and does not include the tax for levee purposes, imposed by Laws 1894, ch. 78, p. 77. *Tate* v. *Levee Commissioners*, 388

PROBATION OF CLAIMS.

1. ESTATES OF DECEDENTS. *Code* 1892, § 1932.

Under Code 1892, § 1932, regulating the subject, a claim for professional services rendered the decedent, not based upon an itemized account, is sufficiently stated for probation against his estate if it be in writing, and specify a definite sum as due from decedent to claimant "for legal advice and service rendered" to decedent. *Foster* v. *Schaffer*, 197.

2. SAME. *Code* 1892, § 1838. *Statute of limitations on probating claims. Code* 1892, § 1933.

The statute of limitations, Code 1892, § 1933, providing that claims against the estate of a decedent shall be barred unless probated within one year after the publication of notice to creditors to probate their claims, has no application where the will of the decedent creates an express trust for the payment of debts, under Code 1892, § 1838, providing that executors, whenever empowered by the will to pay debts, shall follow the directions of the will, as well as the general principles applicable to express trusts. *Gordon* v. *McDougall*, 715

3. WILLS. *Accounting. Unprobated claims.*

Executors who have paid unprobated claims against the testator's estate, in conformity with the directions of a will, creating an express trust for their payment, should be credited therewith in their accounts. *Ib.*

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PROCESS.

CHANCERY PRACTICE. *Injunction writ. Service. Pro confesso. Code* 1892, §§ 549, 3414, 3418.

The service on a defendant of an injunction writ, granted on a bill in equity seeking to restrain defendant from committing trespasses, and demanding damages and the statutory penalty for cutting trees, the same not being a summons and not containing the requisites of one (Code 1892, §§ 3414, 3418), does not authorize the granting of a *pro confesso* to the bill (Code 1892, § 549), although the writ, naming no return-day, commanded the defendant to appear and answer the bill. *Sheffield* v. *Friedberg*, 188.

PRO CONFESSO.

See PROCESS.

Sheffield v. *Friedberg*, 188.

See RES ADJUDICATA, 2.

Hartman v. *Pickering*, 427.

PROXIMATE AND REMOTE CAUSE.

See RAILROADS, 18.

Gulf, etc., R. R. Co. v. *Sneed*, 252.

PUBLIC LAND.

1. CONVEYANCE. *Possession. Improvements.*

A person, not a willful trespasser, who has the possession of public lands, and has placed improvements thereon, has an interest therein which he may convey to his vendee. *Holloway* v. *Miller*, 776.

2. SAME. *Warranty. Breach. Eviction.*

One who purchases from another land, the title to which is found to be in the United States government, may sue at once, without awaiting eviction, upon the covenants in his deed. *Ib.*

3. SAME. *Grantee perfecting title. Measure of damages.*

If a vendee of land upon finding the title to be in the United States government retain possession of the premises and the improvements thereon, and, without notice to his grantor, perfect title in himself, his measure of damages in a suit upon the covenant in his deed is the sums paid in perfecting his title and other damages, if any, caused by the breach of the warranty, not including the purchase price paid his grantor. *Ib.*

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PUNITIVE DAMAGES.

See TELEGRAPH COMPANY, 2.

Cocke v. *Western, etc., Co.*, 380.

RAILROADS.

1. CARRIERS. *Liability for freight. Notice of arrival.*

The liability of a common carrier of goods as carrier continues until a reasonable time for their removal has elapsed after the carrier gives the consignee notice of their arrival at the point to which they were shipped. *Gulf, etc., R. R. Co.* v. *Horton*, 490.

2. SAME. *Custom not to give notice.*

A custom of a common carrier not to give notice to the consignee of the arrival of goods will not terminate its liability as carrier, but the same will continue until such notice is given. *Ib.*

3. CONSTITUTION 1890, SEC. 193. *Fellow-servant rule. Superior servant. Construction.*

A railroad employe, injured by the negligence of a superior officer or agent of the company having the right to direct his services, can recover therefor from the railroad company, under Constitution 1890, sec. 193, modifying the common-law fellow-servant rule, although his injuries were not received when executing some special command or order given by such officer or agent, but while engaged in the discharge of his ordinary duties, and when such officer or agent was engaged in discharging only the ordinary duties of his station. *Southern Ry. Co.* v. *Cheaves*, 565.

4. CONTRACTS. *Municipalities. Police power. Evasion of.*

Where a warehouse company contracted to furnish a railroad company water through conduits, but was without power to construct and maintain the same across the streets of the city in which the water was to be delivered, a subsequent agreement by which the railroad company, having such power, undertook to construct them, is not an illegal evasion of the police power of the city. *Canton* v. *Canton, etc., Warehouse Co.*, 268.

5. LEASE. *Laws 1882, p. 1023, sec. 3. Illinois Central Railroad Company.*

The lease, executed under Laws 1882, p. 1023, sec. 3, authorizing the Illinois Central Railroad Company, a foreign corporation, to lease the Chicago, St. Louis & New Orleans Railroad Company and other domestic railroad companies, invested the lessee, the foreign company, with all the power and franchises of the lessor companies. *Ib.*

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Railroads.

RAILROADS—*Continued.*

6. LEASE. *Public road or way. Streets.*

A railroad company having power, granted by the legislature, to cross any "public road or way" has the right to cross streets as well as country roads. ***Canton*** v. ***Canton, etc., Warehouse Co.***, 268.

7. MUNICIPALITIES. *Legislative power over. Streets.*

The legislature may divest a municipality of control over its streets and authorize their use by a corporation without compensating the municipality. *Ib.*

8. SAME. *Railroads. Conduits across streets. Right of way.*

A railroad company having the right to do all acts incidental to the maintenance of its railroad may lay conduits under the surface of its right of way to conduct water to its buildings, although in so doing the conduits pass under the streets of a municipality. *Ib.*

9. SAME. *Eminent domain. Foreign corporation.*

A foreign railroad corporation, having the right to do all acts incidental to the maintenance of its railroad, will not be denied the right to lay conduits under its right of way across streets, because it has no right to exercise the power of eminent domain. *Ib.*

10. SAME. *Temporary obstruction of street. Nuisance.*

A temporary and partial obstruction of a street by a railroad company in laying conduits across it in its right of way is not a nuisance which can be enjoined. *Ib.*

11. CUSTOM. *Contributory negligence.*

The custom of a certain train to use the main line of a track at a station does not deny it the right to use a side track, or excuse any person walking on the side track when such train is approaching, for a failure to exercise ordinary care. *Morehead* v. *Yazoo, etc., R. R. Co.*, 112.

12. SAME. *Station agent. Walking on track. Assumption of risks.*

A station agent assumes the risk incident to his acts when he goes upon a side track, rather than the space provided for pedestrians between such track and the main line, while walking to the point where he transacts business with trains. *Ib.*

13. SAME. *Engineer. Man on track. Presumption.*

The engineer of a railroad train has the right to assume that a man seen on the track, at a place where there is no difficulty in leaving it, will exercise the common instinct of self-preservation and get off the track before he is reached by the train. *Ib.*

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Railroads.

RAILROADS—*Continued.*

14. FIRES. *Contributory negligence. Insurance.*

In a suit brought by the owner of property destroyed by fire for the use of insurance companies, subrogated to the owner's rights, against a railroad company for negligently causing the fire, where the testimony would support a verdict for either party, instructions for the defendant are erroneous:

(*a*) Which authorize a finding on only a part of the evidence, ignoring the balance; or

(*b*) Which assume the negligence of the owner, the evidence being conflicting on the subject; or

(*c*) Which, propounding the plaintiff's contributory negligence as a defense, omit from the conception of it the element of proximate cause; or

(*d*) Which, propounding said defense, fail to predicate the owner's contributory negligence of knowledge that there was danger to be guarded against. *Brister* v. *Illinois, etc., R. R. Co.*, 33.

15. SAME.

A railroad company which sets out a fire on its right of way so near buildings as to endanger them is negligent, if it fail to guard the fire for the entire time such danger exists. *Ib.*

16. HIGHWAY CROSSING. *Code* 1892, § 3555. *Grades.*

Under Code 1892, § 3555, requiring a railroad company, where its track crosses a highway, to make a convenient crossing and keep it in good order, the grade in the highway required depends upon the extent to which the railroad track is above or below the natural surface of the ground. *Gulf, etc., R. R. Co.* v. *Sneed*, 252.

17. SAME. *Injuries to traveler.*

Under said section a railroad company is not liable for an injury to a traveler resulting from a defect in the highway beyond the crossing, although the highway where defective be on its right of way. *Ib.*

18. SAME. *Proximate and remote cause.*

Where a horse becomes frightened at an object lying in the highway, and the driver, in undertaking to force the animal past the object, causes it to back the vehicle into a gully at the side of the highway, thereby injuring the occupants of the vehicle, the condition of the highway is not the proximate cause of the injury. *Ib.*

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Railroads.

RAILROADS—*Continued.*

19. INTERSTATE COMMERCE. *Intrastate shipments. Agreement as to rates. Discrimination. Code* 1892, §§ 4287, 4290.

A contract by a railroad company to maintain rates from a factory, not exceeding to competitive points the rates from other factory towns, is not on its face void for discrimination, under the Interstate Commerce Act of February 4, 1887, 24 Statutes at Large, 379; nor Code 1892, §§ 4287, 4290. *Laurel Cotton Mills* v. *Gulf, etc., R. R. Co.*, 339.

20. SAME. *Milling in transit.*

A contract by a railroad company to credit to freight charges on manufactured goods any freight received on raw material shipped to the factory, is a millingin-transit agreement, and does not violate the statutes mentioned above. *Ib.*

21. SAME. *Code* 1892, § 4294.

The Interstate Commerce Act, sec. 6, and Code 1892, § 4294, providing for the publication by railroads of schedules of rates and forbidding deviations therefrom, do not render invalid a contract by a railroad company to charge no greater rate from a factory to competitive points than is charged from other places, nor prohibit the maintaining of a milling-in-transit agreement, in the absence of any showing that the rates fixed for the contract were different from the approved rates, or that any schedule of rates had been submitted to the commission at all before the contract was made. *Ib.*

22. SAME. *Approval of rates. Burden of proof.*

The burden is not on the plaintiff to show, in a suit against a railroad for breach of contract to transport freight at a specified rate, that the contracted rate did not vary from the schedule filed with the Interstate Commerce Commission or approved by the State Railroad Commission, as required by the Interstate Commerce Act, and Code 1892, § 4292. *Ib.*

23. MASTER AND SERVANT. *Incompetent employes. Personal injuries. Common law liability. Ch.* 66, *Laws* 1898; *ch.* 87, *Laws* 1896.

The decision (*Ballard* v. *Cotton Oil Co.*, 81 Miss., 507) declaring ch. 66, Laws 1898, and ch. 87, Laws 1896, unconstitutional as class legislation, because of the modification of the fellow-servant rule therein contained was applied to all corporations without reference to the use of dangerous agencies in their business, does not relieve a railroad company of its common law liability for injuries causing the death of an employe when such injuries resulted from its em-

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RAILROADS—*Continued.*

ployment, without due care, of other servants who were incompetent. *Yazoo, etc., R. R. Co.* v. *Schraag*, 125.

24. MASTER AND SERVANT. *Pleading. Sufficiency.*

In an action for the death of an engineer, resulting from a collision with a switch engine, a declaration alleging that the switch engine was carelessly, recklessly, and negligently ordered out of the yards by the agent of the company, who was engaged in another department of labor, and made to proceed on a track which curved sharply around a high embankment at the time when a passenger train proceeding in the opposite direction was entitled to the use of the same track; that the collision was directly due to the reckless ordering out of the engine; that it was impossible for deceased who was the engineer on the passenger train to check the same after he saw the track was obstructed by another engine, which obstruction was, through the order of the agent, negligently allowed by defendant to be made on the track, is sufficient to sustain a recovery on the ground of negligence of the defendant in failing to furnish competent employes, where such negligence was established as that of a yardmaster whose authority to give the order characterized him as a superior agent of the company, and the declaration was not attacked on the trial, and defendant asserted deceased's contributory negligence was the only available defense. *Ib.*

25. SAME. *Sufficiency of declaration. Statute of jeofails. Code* 1892, § 746.

Under Code 1892, § 746, providing a judgment shall not be reversed after verdict for any mistake or misconception of the form of action, or for any other defect of form in the declaration, an objection to plaintiff's right to recover because of an insufficiently stated cause, and not her right to recover on a properly stated cause, is an objection to the form of pleading, which must be seasonably interposed in the trial court. *Ib.*

26. SAME. *Objection not made on trial.*

Where a defendant in an action for death resulting from a collision relied on the single ground of deceased's contributory negligence, it cannot, on appeal, assert the insufficiency of the declaration to state a cause of action for negligence in furnishing incompetent servants. *Ib.*

27. PASSENGERS. *Falling from train. Negligence.*

It is negligence for a passenger to voluntarily attempt to pass from one car to another while the train is running at a rapid rate of speed around a curve. *Dougherty* v. *Yazoo, etc., R. R. Co.*, 502.

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Railroads.

RAILROADS—*Continued.*

28. PASSENGERS. *Coercion.*

If a passenger by coercion or direction of the railroad servants attempt to pass from one car to another of a train while running at a rapid rate around a curve and fall from the train, the question of his negligence is for the jury. *Dougherty* v. *Yazoo, etc., R. R. Co.*, 532.

29. PASSENGER DEPOTS. *Code* 1892, § 3549. *Backing train.*

Code 1892, § 3549, regulating the backing of trains near passenger depots:

(*a*) Is not restricted in its application to any particular class of persons;

(*b*) Is a regulation intended to preserve and protect human life and limb, and should be given full scope in accordance with its plain meaning and not restricted by strained interpretation; and

(*c*) Affords protection to all persons injured by a backing train within three hundred feet of a passenger depot; the phrase "within fifty feet thereof" refers to the distance from the depot to the nearest point of the track on which the train is backing. *Yazoo, etc., R. R. Co.* v. *Metcalf*, 242.

30. SAME. *Walking between tracks. Gross negligence. Licensee.*

Where a railroad company permitted and impliedly consented to the use by the public generally of a path between two of its tracks near a passenger depot, and the plaintiff, thoroughly familiar with the surroundings, while using the path on a dark night was injured, within three hundred feet of the depot, by a rod negligently permitted to protrude from an engine backing into the depot, the plaintiff's use of the path was not, as a matter of law, such gross negligence as to take the case without the statute. *Ib.*

31. PLEADINGS. *Declaration. Antagonistic causes of action. Same count.*

A declaration, with but one count, stating two antagonistic causes of action, will not sustain a verdict for plaintiff on either cause of action, where the jury were instructed in respect to both and it cannot be ascertained which of the instructions were controlling. *Illinois, etc., R. R. Co.* v. *Abrams*, 456.

32. SAME. *Master and servant. Railroads. Fellow-servants. Constitution* 1890, *sec.* 193; *Code* 1892, § 3559.

A cause of action predicated of the master's negligence, in failing to furnish his servant a safe place in which to work, is inconsistent and should not be joined in the same count with a cause of action arising from the negligence of a fellow-servant, based on Constitution 1890, sec. 193, and Code 1892, § 3559, modifying the common-law fellow-servant rule. *Ib.*

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RAILROADS—*Continued.*

33. TRESPASSER. *Freight train. Erroneous information. Track supervisor.*

A person is a trespasser, though not a willful one, and not a passenger under an implied contract, who boards a freight train which does not carry passengers, believing from erroneous information given him by the railroad company's supervisor of tracks that he had the right to take passage thereon. *Alabama, etc., Ry. Co.* v. *Livingston,* 1.

34. SAME. *Ejection. Trespasser. Cursing and abusing.*

A railroad company is liable for the misconduct of the conductor of its freight train, which did not carry passengers, if he curse and abuse a trespasser on ejecting him from the train. *Ib.*

35. SAME. *Damages. Excessive verdict.*

Where plaintiff boarded a freight train erroneously believing that he had a right to travel thereon, and was expelled by the conductor, between stations on a stormy night, with abuse and cursing after an offer to pay his fare, a judgment for $2,000 in favor of plaintiff is excessive, and will be reversed unless $1,000 be remitted. *Ib.*

RAPE.

1. CRIMINAL LAW. *Attempt. Conviction of under indictment for the crime. Code* 1892, § 1426.

Code 1892, § 1426, providing that on an indictment for any offense the jury may convict the defendant of an attempt to commit it, is applicable to the crime of rape, and a defendant's instruction excepting it therefrom was properly refused. *Horton* v. *State,* 473.

2. SAME. *Character.*

On a trial for rape it is error to refuse to admit testimony on behalf of defendant of his general reputation for peace or violence. *Ib.*

REASONABLE DOUBT.

CRIMINAL LAW. *Satisfaction of jurors' minds and consciences.*

An instruction authorizing the conviction of a defendant if the minds and consciences of the jury are fully satisfied of his guilt is erroneous; the jury should not convict unless satisfied of a defendant's guilt beyond every reasonable doubt arising from the evidence. *Jones* v. *State,* 194.

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RECEIPTS.

1. DEEDS. *Acknowledgment of purchase money. Parol evidence.*

An acknowledgment of the payment of the purchase money contained in a deed is but a receipt and may be contradicted by parol evidence. *Fowlkes* v. *Lea*, 509.

2. SAME. *Statute of limitations. Code* 1892, § 2737. *Written promise.*

A recital of a consideration in a deed, which is proved not to have been paid, is a promise in writing by the grantee to pay it, and such promise is only barred by the statute of limitations (Code 1892, § 2737), applicable to written promises. *Ib.*

REFORMATION.

1. CHANCERY PRACTICE. *Cross-bill. Prayer for general relief. Reformation granted.*

Where a cross-bill based on a mistake in a deed concluded with a prayer for general relief, the chancellor should have decreed that the cross-complainants were, as to the cross-defendants, the owners of the property in question, where the proof showed such to be the case, although the cross-bill did not seek the reformation of the deed. *Moore* v. *Crump*, 612.

2. DEEDS. *Description. Name of tract. Evidence.*

A deed to a plantation describing the same by its well-known name, although reciting that it consisted of certain lands designated by government survey descriptions, aided by proof that the grantee, with the knowledge and consent of the grantor, entered into the possession of the lands which had previously passed as a part of the plantation, warrants the conclusion that the grantor intended to convey all of said lands and may be reformed so as to specifically include a part thereof not described therein by survey descriptions. *Miles* v. *Miles*, 624.

3. SAME. *Intentional use of mistaken terms.*

The description of land in a deed may be reformed so as to embrace the tract sought to be conveyed, although the parties intentionally used the terms of description as written in the deed, if they did so under the mistaken impression that they properly described the tract. *Ib.*

4. SAME. *Consideration. Volunteers.*

The grantees in a deed, supported in part by a valuable consideration, are not mere volunteers, and are not precluded from having the

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REFORMATION—*Continued.*

deed reformed, although the entire consideration may not have been a valuable one. *Miles* v. *Miles*, 624.

5. DEEDS. *Concrete case.*

Where a deed from a grantor to his son was a part of the transaction by which a family settlement was arranged and perfected, and the purchase by such son of his brother's interest was a part of the consideration moving the grantor to divide the property, a court of equity will reform the deed to effectuate the intention of the parties, as they occupied the position of persons who had inherited the property, undertaken to divide it, and a mutual mistake had occurred. *Ib.*

RENTS.

See PARTITION, 1.
Walker v. *Williams*, 392.

See EXEMPTIONS, 1.
Martin v. *Martin*, 553.

See VENDOR AND VENDEE, 5.
Mortgage Co. v. *Todd*, 522.

REPEALS.

See PRIVILEGE TAXES, 2.
Tate v. *Levee Commissioners*, 388.

REPLEVIN.

1. LANDLORD AND TENANT. *Farming on shares.*

Where a landlord and his tenant were farming on shares a plaintiff, who has the right of possession against the tenant, may by an action of replevin recover the tenant's share of the crops from the landlord. *Alexander* v. *Zeigler*, 560.

2. SAME. *Waiver of landlord's lien. Commingling goods. Estoppel.*

A landlord who has waived his lien for rent in favor of one who advances supplies to a tenant on the security of a deed of trust on his cotton crop, is, after receiving cotton to the amount of four bales from the tenant and mingling the same with his own, estopped to deny that a bale of cotton seized by the trustee was produced by the tenant on the demised premises. *Ib.*

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RES ADJUDICATA.

1. CHANCERY PRACTICE.

A complainant in an equity suit cannot escape a plea of *res adjudicata* by bringing the suit in the name of another, not a party to the previous suit for his use. *Hartman* v. *Pickering*, 427.

2. SAME. *Pro confesso.*

A final decree of the chancery court predicated of a *pro confesso* just as effectually adjudicates the rights of the parties as any other final decree. *Ib.*

3. SAME. *Concrete case.*

A suit in equity enjoining an action of ejectment and seeking a reformation of deeds and a sale of the lands to satisfy certain liens, under a defective foreclosure of which the complainant acquired an interest in the land, to which a tenant of the complainant, an assignee of the lease, claiming a conditional right to become a purchaser at the end of the lease, is made a defendant and who is charged to have colluded with the plaintiff in ejectment in order to defraud the complainant, and which culminates in a decree in complainant's favor directing the sale of the lands, subject to certain adjudicated rights of the tenant, will preclude the tenant from asserting any greater rights than those awarded him by the decree. *Ib.*

4. SECOND APPEAL.

Where the supreme court reversed a decree in defendant's favor and adjudged complainant entitled to recover a certain per centum of money received by defendant and remanded the case for an accounting, the judgment is conclusive on a second appeal of complainant's right to recover. *Nutt* v. *Knut*, 465.

5. SAME.

Where, in a suit to set aside a trust deed, the court, on appeal, in its opinion referred to an instrument appointing a substituted trustee, but no question as to the validity of the appointment was passed on, there was no ground for striking such reference from the opinion, on the idea that it might preclude complainant on the next trial from attacking the validity of the appointment. *Weir* v. *Jones*, 610.

RESERVATIONS.

1. DEEDS.

In order for a reservation in a deed to be operative it must withhold from the grant something which would have passed by the deed but for the reservation. *Barataria, etc., Co.* v. *Ott*, 737.

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RESERVATIONS—*Continued.*

2. DEEDS. *Construction.*

In construing a reservation in a deed it is not competent to show by evidence *aliunde* the intention of the parties, as the deed speaks for itself; and if the reservation be so indefinite as not to convey any certain meaning, it will be ineffectual. ***Barataria, etc., Co.*** v. ***Ott,*** 737.

RES JESTAE.

Boyd v. *State,* 414.

SALES.

1. CONTRACT. *Breach by buyer. Remedy of seller.*

On the breach of a contract to purchase personal property the seller may:

(*a*) Complete the contract on his part, and sue for the contract price; or

(*b*) Treat the contract as ended, retain the property as his own, and sue for the difference between the market value and the contract price; or

(*c*) Sell the property at public or private sale for the best price he can obtain, and sue for the difference between the price realized and the contract price. *American, etc., Co.* v. *Herring,* 693.

2. SAME. *Case. Measure of damages.*

Where by the terms of a contract defendant agreed to buy plaintiff's cotton during a season at an agreed sum per hundred pounds less than the market price of cotton in a certain city on the day of sale and the plaintiff tendered a designated number of bales when the market price in said city was 9 13-16 cents per pound, which the defendant refused to buy at that price, but offered to do so on the basis of 9 9-16 cents per pound as the city market price, which plaintiff declined, subsequently selling at 9 cents per pound, the measure of plaintiff's damages is not the difference between 9 and 9 13-16 cents per pound, but the difference between 9 9-16 and 9 13-16 cents per pound. *Ib.*

3. SAME.

Where defendant agreed to purchase all complainant's cotton during a season at twelve cents per one hundred pounds below the actual *bona fide* market value of the cotton in a warehouse at another place, and the agreement stated that the price would "ordinarily" be based

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SALES—*Continued.*

on the last official quotation of the day, though defendant was not bound to adopt the closing quotations for the day as a basis by which to estimate the price which it would pay for the cotton, it could not, at any time, under the contract, compel complainant to take less than twelve cents per hundred pounds below the actual value of the cotton, whatever basis was adopted in arriving at that value. ***American, etc., Co.*** v. ***Herring,*** 693.

4. SALES. *Waiver by seller.*

Where defendant had agreed to take all of complainant's cotton during the season at a stipulated amount less than the actual market value of the cotton on the day on which it was sold, and on a certain day refused to pay complainant the contract price in accordance with the market quotation on that day, but thereafter complainant did not notify defendant that he intended to stand on his contract, but continued to treat the cotton as his own, and acted in accordance with a letter in which defendant repudiated the terms of its original agreement, he thereby waived his rights under the contract. *Ib.*

5. SAME. *Right to storage, insurance, etc.*

Where complainant offered cotton for sale at a certain price, and defendant refused to take it, and complainant did not insist on the terms of a contract by which defendant was bound to take it at that price, but left the cotton in storage with defendant, treating it as his own, defendant was entitled to charge complainant storage, insurance, and interest on money advanced on the cotton left with him. *Ib.*

6. SAME.

Where complainant directed the sale of cotton at nine cents, he waived his rights under a contract by which he was entitled to the actual *bona fide* market value of the cotton on the day of sale, and which, on the day of his order, was nine and one-eighth cents. *Ib.*

SCRAMBLING POSSESSION.

STATUTE OF LIMITATIONS. *Code* 1892, §§ 2730, 2731, 2734.

A mere scrambling possession is not sufficient to support a defense of the statute of limitations, under Code 1892, §§ 2730, 2731, 2734, barring all suits for the possession of land where defendant or those under whom he claims have been in the actual adverse possession thereof for ten years before plaintiff's cause of action accrued. *Mitchell* v. *Bond,* 72.

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SEASHORE.

1. LANDS BOUNDED BY SEA. *Owner's rights. Fishing. Oyster taking.*

In the absence of an express statute the owners of land bounded by the sea possess no exclusive right to the soil under the water beyond high water mark, and they have no greater right than others of fishing and gathering oysters from natural beds in front of their property. *Barataria, etc., Co.* v. *Ott*, 737.

2. SAME. *Code* 1880, § 956. *Code* 1892, § 3080, *et seq.*

Code 1880, § 956, granting the board of supervisors of the counties bordering on the Gulf of Mexico jurisdiction in the matter of the protection and preservation of oysters growing and being grown within the limits of their respective counties and with power to grant private rights of property in oysters banked, planted, or cultivated in the waters of the county, is constitutional, and a private right to bank, plant, and cultivate oysters in the waters of the sea, within the limits of the county, acquired from the board of supervisors under said statute is valid. *Ib.*

SELF-DEFENSE.

CRIMINAL LAW. *Murder. Self-defense. Instruction. Abandonment of intent to kill.*

In a murder case it is error to give an instruction for the state denying defendant the right of self-defense if he armed himself with a deadly weapon and provoked the difficulty with intent to kill deceased, there being testimony tending to show that defendant abandoned the intent to kill before slaying the deceased, and that the killing was in self-defense. *Jones* v. *State*, 194.

SHADE TREES.

LIGHTS. *Code* 1892, § 2947. *Trimming.*

A municipality may, without compensating the abutting owner, under Code 1892, § 2947, giving it full jurisdiction over streets with power to light them, trim trees standing between the sidewalk and the street to any extent necessary to prevent interference with the wires of an electric light plant erected by it. *Hazlehurst* v. *Mayes*, 7.

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SOLICITORS' FEES.

See ESTATES OF DECEDENTS, 17.

Dobbs v. *Chandler*, 372.

See PARTITION, 4.

Walker v. *Williams*, 392.

See ATTORNEY AND CLIENT, 1, 2, 3, 4.

Halsell v. *Turner*, 432.

Clifton v. *Clark*, 795.

See BOARD OF SUPERVISORS, 1.

Hinton v. *Perry County*, 536.

SPECIAL VENIRE.

CRIMINAL LAW. *Murder. Juries. Code* 1892, § 2389.

If an impartial jury be obtained in a murder case, the defendant cannot, after conviction, predicate error of an irregularity in the drawing of a special venire, since the statutes on the subject (Code 1892, § 2389) are directory. *Buchanan* v. *State*, 332.

SPECIFIC PERFORMANCE.

ESTATES OF DECEDENTS. *Contract for sale of land.*

Where the administrator of a decedent who contracted to convey lands is not a party to the suit, and complainant admits that the decedent was without title, specific performance of the contract should not be decreed. *Southworth* v. *Brownlow*, 405.

STATE LANDS.

1. TAXATION. *Purchase from state. Date of liability for accruing taxes. Code* 1892, §§ 3794*a*, 3801.

Lands purchased from the state after February 1st, but before October 1st, are not liable to taxation for the year in which the purchase is made, any more than lands so purchased after October 1st, under Code 1892, § 3794*a*, requiring copies of assessment rolls to be delivered to the auditor and tax collector on or before October 1st, and Code 1892, § 3801, directing the collector to collect taxes on receipt of the rolls. *Wildberger* v. *Shaw*, 442.

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STATE LANDS—*Continued.*

2. TAX TITLE. *Release of state's title. Acts* 1884 *and* 1888. *Gibbs* v. *Green.*

Where land was sold in 1867 to the state for taxes and again in 1870 to the liquidating levee board, and afterwards under the decree of the chancery court of Hinds county, in *Gibbs* v. *Green,* purchased by one who procured a release of the state's title under the acts of March 4, 1884 (Laws, p. 182), and March 2, 1888 (Laws, p. 41), the validity of the title so acquired is not affected by the question whether the title was in the levee board or state, since if either had title, he acquired it; and such land is thereafter subject to sale for unpaid taxes as his property. *Means* v. *Haley,* 550.

STATUTE OF FRAUDS.

1. AGREEMENT NOT TO BE PERFORMED WITHIN ONE YEAR. *Code* 1892, § 4225, *par. d.*

A contract which may or may not be performed in one year is not within the statute of frauds (Code 1892, § 4225, par. d.), providing that an action shall not be brought whereby to charge a defendant upon any oral agreement which is not to be performed within the space of one year from the making thereof. *Steen* v. *Kirkpatrick,* 63.

2. CONSIDERATION OF MARRIAGE. *Contemplation of marriage. Code* 1892, § 4225, *par. b.*

An agreement, made in contemplation of marriage after the contract to marry has become binding, is not an agreement in consideration of marriage within the meaning of the statute of frauds (Code 1892, § 4225, par. b), providing that an action shall not be brought whereby to charge a defendant upon any oral agreement made upon consideration of marriage. *Ib.*

3. DEBT, DEFAULT, OR MISCARRIAGE OF ANOTHER. *Code* 1892, § 4225 (*a*).

Where the purchaser of goods promised the seller to pay the purchase money to a creditor of the seller, the promise is not within the statute of frauds. Code 1892 § (a), providing that an action shall not be brought whereby to charge a defendant upon any special promise to answer for the debt or default or miscarriage of another person. *Wear-Boogher, etc., Co.* v. *Kelly,* 236.

4. SALE OF LANDS. *Code* 1892, § 4225, *par. c.*

A prenuptial parol contract as to the rights of the parties about to be married in the real estate of each other is not enforcible, under Code

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STATUTE OF FRAUDS—*Continued.*

1892, § 4225, par c, providing that an action shall not be brought whereby to charge a defendant upon any oral contract for the sale of lands or the making of any lease thereof for a longer term than one year. *Steen* v. *Kirkpatrick*, 63.

5. TRUSTS. *Obtaining conveyance by fraud. Code* 1892, § 4230. *Parol evidence. Sufficiency of evidence.*

A trust, not within the statute of frauds (Code 1892, § 4230), and which may be established by parol, will be raised in favor of a party to whom land was intended to be granted or devised, if another by actual fraud obtains the legal title thereto; but the trust can be established only upon clear and convincing proof of the fraud. *Moore* v. *Crump*, 612.

STATUTE OF LIMITATIONS.

1. ADVERSE POSSESSION. *Code* 1892, §§ 2730, 2731, 2734. *Equity. Reformation.*

Where a grantor owned only the north half of a section of land and, intending to convey it, by error conveyed the west half and the grantee took actual possession of the land intended to be conveyed:

(*a*) The grantor and those holding under him will be barred of all claim to the land intended to be but not actually conveyed after the expiration of ten years from the beginning of such possession; and

(*b*) Equity would, on proper application, reform the deed so as to make it convey the land intended to be conveyed. *Moore* v. *Crump*, 612.

2. APPEALS. *Code* 1892, § 2752.

Although an appeal bond be filed within two years after the rendition of the judgment sought to be appealed from, the appeal will be barred, under Code 1892, § 2752, limiting the time within which appeals to the supreme court shall be taken, if no citation be served on the appellee and no transcript of the record be filed in the supreme court before the expiration of such time. *Chambliss* v. *Wood*, 209.

3. PROBATING CLAIMS. *Code* 1892, § 1838. *Code* 1892, § 1933.

The statute of limitations, Code 1892, § 1933, providing that claims against the estate of a decedent shall be barred unless probated within one year after the publication of notice to creditors to probate their claims, has no application where the will of the decedent creates an express trust for the payment of debts, under Code 1892, § 1838, providing that executors, whenever empowered by the will to

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STATUTE OF LIMITATIONS—*Continued.*

pay debts, shall follow the directions of the will, as well as the general principles applicable to express trusts. *Gordon* v. *McDougall*, 715.

4. TAX TITLES. *Code* 1892, § 2735.

The three years' statute of limitations, Code 1892, § 2735, providing that three years' actual occupation of land under a tax title shall cure all defects in the title and bar suits to recover the land, has no application where the land was not subject to taxation at the time it was sold for taxes. *Mitchell* v. *Bond*, 72.

5. SAME. *Adverse possession of part.*

Where a deed is void as to a part of the land conveyed, but the grantee occupies a portion thereof to which, under another deed, he actually has title, such fact does not give him constructive possession of the other part, so as to disseize the real owner, unless the occupation be such as to raise a reasonable presumption that the rightful owner knew of the entry made under the color of title. *Ib.*

6. SAME. *Code* 1892, §§ 2730, 2731, 2734. *Scrambling possession.*

A mere scrambling possession is not sufficient to support a defense of the statute of limitations under Code 1892, §§ 2730, 2731, 2734, barring all suits for the possession of land where defendant or those under whom he claims has been in the actual adverse possession thereof for ten years before plaintiff's cause of action accrued. *Ib.*

7. WRITTEN PROMISE. *Code* 1892, § 2737.

A recital of a consideration in a deed, which is proved not to have been paid, is a promise in writing by the grantee to pay it, and such promise is only barred by the statute of limitations (Code 1892, § 2737), applicable to written promises. *Fowlkes* v. *Lea*, 509.

STREETS.

See MUNICIPALITIES, 12, 13, 14, 15, 17, 19, 20.

Hazlehurst v. *Mayes*, 7.

Canton v. *Canton, etc., Warehouse Co.*, 268.

Laurel v. *Rowell*, 435.

SUBORNATION OF PERJURY.

See ATTEMPTS, 2.

State v. *Booker*, 187.

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SUBSTITUTED TRUSTEE.

1. DEED OF TRUST. *Appointment. Attorney in fact.*

The attorney in fact of the beneficiary of a deed of trust cannot appoint a substituted trustee where the deed provides for the appointment "by the beneficiary or any holder of the notes secured or their legal representatives." *Allen* v. *Alliance Trust Co.*, 319.

2. SAME. *Duty.*

Where the beneficiary in a deed of trust regularly appointed a substituted trustee, by a writing containing a direction that the trustee proceed to foreclose the deed, it is the duty of the trustee to proceed as directed. *Weir* v. *Jones*, 602.

SUPERVISORS, BOARD OF.

1. COUNTIES. *Injunctions. Dissolution. Damages. Solicitor's fees.*

Solicitor's fees are allowable as damages upon the dissolution of an injunction restraining the board of supervisors of a county from removing a county seat. *Hinton* v. *Perry County*, 536.

2. JUDGMENTS. *Collateral attack.*

Defects in the proceedings and judgments of a board of supervisors, not jurisdictional in their nature, are unavailing in a collateral proceeding to defeat the action of the board. *Ib.*

3. SAME. *Limited jurisdiction. What record to show.*

In matters in which the board of supervisors have limited jurisdiction its record must show jurisdictional facts, but need not set out the evidence thereof. *Ib.*

4. SAME. *Fraud. Corruption.*

Any judgment of the board of supervisors may be attacked on the ground of fraud or corruption when seasonably set up and pleaded. *Ib.*

5. POSTAGE. *Chancery clerk. Code* 1892, § 296.

It is the duty of the board of supervisors, under Code 1892, § 296, requiring it to furnish the county officers with necessary stationery, furniture, and "all other necessary articles," to furnish the necessary postage to be used in the official business of the clerk of the chancery court. *Downing* v. *Hinds County*, 29.

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SUPPLEMENTAL BILL.

See CHANCERY PLEADING AND PRACTICE, 3.

Levy v. *Royston*, 15.

SUPREME COURT PRACTICE.

1. DEMURRER ERRONEOUSLY SUSTAINED. *No affirmance on facts.*

Where, in a suit by a trustee in bankruptcy to set aside a transfer of property made by the bankrupt, a demurrer was erroneously sustained to the bill and the same dismissed after evidence had been taken, the court on appeal will not affirm the judgment on the theory that the decision was correct, although made on the wrong grounds, there having been no decision on the evidence, but only on the pleadings. *Thompson* v. *First National Bank*, 54.

2. TRANSCRIPT. *Exhibits to bill in equity. Recitals.*

Where an original bill in equity made a deed from a substituted trustee in a deed of trust an exhibit thereto and a part thereof, and the deed so exhibited made the instrument appointing the substituted trustee a part of itself, and the same was copied into the transcript, it became on appeal a part of the record in the supreme court, although an amended bill was filed in the case which simply referred to the deed and did not make it an exhibit to the bill as amended. *Weir* v. *Jones*, 610.

SURVEYS.

MUNICIPALITIES. *Town lots. Plats. Failure to record. Sales. Penalty. Code* 1892, § 4403. *Construction.*

Code 1892, § 4403, imposing a penalty for selling lots in a municipality, or subdivision thereof or addition thereto, thereafter laid out, without first having a plat thereof prepared and recorded, has no application to a municipality incorporated before it became operative nor to private surveys made before that time. *Wellborn* v. *Muller*, 726.

TAXATION.

1. INSOLVENT BANK. *Assignment. Duty of assignee. Code* 1892, § 3755.

Under Code 1892, § 3755, providing that every taxpayer, when requested, shall make out and deliver to the assessor a true list of his taxable personal property, held in his own right or as trustee or otherwise, on February 1st preceding, the notes and solvent credits

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TAXATION—*Continued.*

of an insolvent bank, passed to an assignee by a general assignment before February 1st in any year, are taxable in the hands of the assignee and he should render them to the assessor. *Gerard* v. *Duncan*, 731.

2. INSOLVENT BANK. *Double taxation.*

The fact that the creditors of an insolvent bank, whose solvent credits are taxed in the hands of an assignee, have the debts due them from the bank assessed against them does not constitute double taxation. *Ib.*

3. LEVEE BOARD. *Lands held by.*

While lands belonged to the board of liquidating levee commissioners, under a valid tax sale for levee taxes, they are not subject to be again sold for levee taxes, and if so resold, no title is thereby conveyed. *Mitchell* v. *Bond*, 72.

4. PRIVILEGE TAX. *Constitution* 1890, *sec.* 112. *Lumber business. Exemption. Non-exporter. Interstate commerce. Constitution of the United States, art.* 1, *sec.* 8, *clause* 3. *Laws* 1900, *p.* 43, *ch.* 43, *sec.* 8.

The eighth section of the act of March 9, 1900 (Laws 1900, p. 43, ch. 43, sec. 8), purporting to impose a privilege tax "on each land timber mill company," etc., but excepting therefrom sawmill operators who do not ship timber or lumber out of the state, is unconstitutional, in that it violates:

(*a*) Constitution 1890, sec. 112, declaring that taxation shall be uniform and equal; and

(*b*) Constitution of the United States, art. 1, sec. 8, par. 3, giving congress power to regulate commerce between the states, since it seeks to impose a tax on interstate commerce. *Adams* v. *Mississippi Lumber Co.*, 23.

5. STATE LANDS. *Purchase from state. Date of liability for accruing taxes. Code* 1892, §§ 3794*a*, 3801.

Lands purchased from the state after February 1st, but before October 1st, are not liable to taxation for the year in which the purchase is made, any more than lands so purchased after October 1st, under Code 1892, § 3794*a*, requiring copies of assessment rolls to be delivered to the auditor and tax collector on or before October 1st, and Code 1892, § 3801, directing the collector to collect taxes on receipt of the rolls. *Wildberger* v. *Shaw*, 442.

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TAXATION—*Continued.*

See PRIVILEGE TAXES.

Adams v. *Mississippi Lumber Co*, 23.
Tate v. *Levee Com'rs*, 388.

TAXES.

See PARTITION, 1.

Bennett v. *Bennett*, 493.
Walker v. *Williams*, 392.

See VENDOR AND VENDEE, 6.
Mortgage Co. v. *Todd*, 522.

TAX SALE.

See TAXATION, 3.
Mitchell v. *Bond*, 72.

TAX TITLES.

RELEASE OF STATE'S TITLE. *Acts* 1884 *and* 1888. *Gibbs* v. *Green.*

Where land was sold in 1867 to the state for taxes and again in 1870 to the liquidating levee board, and afterwards under the decree of the chancery court of Hinds county, in *Gibbs* v. *Green*, purchased by one who procured a release of the state's title under the acts of March 4, 1884 (Laws, p. 182), and March 2, 1888 (Laws, p. 41), the validity of the title so acquired is not affected by the question whether the title was in the levee board or state, since if either had title, he acquired it; and such land is thereafter subject to sale for unpaid taxes as his property. *Means* v. *Haley*, 550.

TELEGRAPH COMPANIES.

1. CONTRACT. *Claim for damages. Time for filing.*

A provision in a contract for the transmission and delivery of a telegram that the telegraph company will not be liable for damages in any case, unless a written claim for damages is presented to it within sixty days after reception of the message for transmission, is reasonable and valid. *Hartzog* v. *Western, etc., Co.*, 448.

2. DISCLOSURE OF MESSAGE. *Punitive damages.*

The thoughtless disclosure by a telegraph operator of the contents of a message addressed to the plaintiff, relating to a public matter which otherwise would have become generally known in a very short time, does not justify the imposition of punitive damages on the telegraph company. *Cocke* v. *Western, etc., Co.*, 380.

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TELEGRAPH COMPANIES—*Continued.*

3. DISCLOSURE OF MESSAGE. *Statutory penalty. Code* 1892, § 1301.

Code 1892, § 1301, imposing a penalty on employes of telegraph companies for divulging the contents of a message, has no application to an action against the company for damages resulting from the publication of a message. *Cocke* v. *Western, etc., Co.*, 380.

4. NIGHT MESSAGE. *Delay. Exemplary damages. Contributory negligence. Actual damages.*

The sendee of a telegraphic message is not entitled, because of delay in its delivery, to recover from the telegraph company:

(*a*) Exemplary damages in the absence of gross negligence, willful wrong and wanton disregard of plaintiff's rights; nor

(*b*) Actual damages which resulted not from delay in the delivery of the message, but from plaintiff's failure to promptly answer it when it was delivered. *Western, etc., Co.* v. *Spratley*, 86.

TENANTS IN COMMON.

LIFE ESTATE. *Conveyance by some. Effect. Rights of remaindermen.*

Where land is owned by several persons, one having a fee simple estate in an undivided one-half interest, and another a life estate, and still others the remainder in the other half, a sale of a specific part of the land by the fee-simple owner of the undivided one-half of the whole tract will not vest in the purchaser a half interest in the whole tract, although the life tenant of the other undivided half joined therein, but the conveyance will be subject to the ascertainment of specific shares by partition and is voidable by the remaindermen not parties to it. *Levee Commissioners* v. *Nelms*, 642.

See PARTITION, 1.

Bennett v. *Bennett*, 493.

Walker v. *Williams*, 392.

TRESPASSER.

See RAILROADS, 32.

Alabama, etc., Ry. Co. v. *Livingston*, 1.

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TRUSTEE.

DEED OF TRUST. *Tender of interest.*

The trustee in a deed of trust to secure a past due debt is not required to postpone a duly advertised sale of the property because the debtor tenders part payment, the interest, in the absence of any provision to that effect in the deed. *Weir* v. *Jones*, 602.

See SUBSTITUTED TRUSTEE, 1.

Allen v. *Alliance Trust Co.*, 319.

TRUSTEE IN BANKRUPTCY.

SUITS BY. *Fraudulent conveyance.*

A trustee in bankruptcy, as the representative of the creditors of the estate, may maintain a suit in equity to set aside fraudulent deeds made by the bankrupt, and subject the property conveyed to his debts. *Thompson* v. *First National Bank*, 54.

TRUSTS.

See STATUTE OF FRAUDS, 5.

Moore v. *Crump*, 612.

UMPIRE.

ACTING WITH ARBITRATORS. *Waiver of objection.*

An objection to an award, predicated of the fact that the umpire who was to be called upon to act only in case of a disagreement between the arbitrators selected by the parties, was sworn and acted with the arbitrators from the beginning, is waived if the parties are present at the hearing and do not object to such procedure. *Mississippi Cotton Oil Co.* v. *Buster*, 91.

VENDOR AND VENDEE.

1. PUBLIC LANDS. *Conveyance. Possession. Improvements.*

A person, not a willful trespasser, who has the possession of public lands, and has placed improvements thereon, has an interest therein which he may convey to his vendee. *Holloway* v. *Miller*, 776.

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VENDOR AND VENDEE—*Continued.*

2. PUBLIC LANDS. *Warranty. Breach. Eviction.*

One who purchases from another lands, the title to which is found to be in the United States government, may sue at once, without awaiting eviction, upon the covenants in his deed. *Holloway* v. *Miller*, 776.

3. SAME. *Grantee perfecting title. Measure of damages.*

If a vendee of land upon finding the title to be in the United States government retain possession of the premises and the improvements thereon and, without notice to his grantor, perfect title in himself, his measure of damages in a suit upon the covenants in his deed is the sums paid in perfecting his title and other damages, if any, caused by the breach of the warranty, not including the purchase price paid his grantor. *Ib.*

4. WARRANTY OF TITLE. *Breach. Damages. Interest.*

Interest on the purchase money paid for land is not recoverable as damages for breach of warranty of title when the evicted grantee has been acquitted of all liability to the owner of the land for mesne profits without paying the same; and in such case the proportion between the amount of the interest and the value of the mesne profits is wholly immaterial. *Mortgage Co.* v. *Todd*, 522.

5. SAME. *Mesne profits. Improvements and taxes. Proportion.*

The measure of damages recoverable for breach of warranty of title is not affected by the proportion that exists between the value of the mesne profits received by the evicted grantee and his outlay for improvements and taxes. *Ib.*

6. SAME. *Surplus. Set-off. Purchase money.*

The surplus of mesne profits received by an evicted grantee in excess of his outlay for improvements and taxes cannot in an action for breach of warranty of title be set off against the purchase money of the land on the ground that the same has been credited upon a mortgage debt due to the warrantor, in an equity suit wherein the mortgagor has procured the cancellation of the warrantor's purchase of the land under an invalid foreclosure of the mortgage. *Ib.*

VENUE.

See ATTACHMENTS, 1.

McCloud v. *McCullers*, 20.

See JUDGMENTS, 4, 5, 6.

Wise v. *Thread*, 200.

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WARRANTY OF TITLE.

See VENDOR AND VENDEE, 1, 2, 3, 4, 5, 6.

Holloway v. *Miller*, 776.

Mortgage Co. v. *Todd*, 522.

WAIVER.

1. ARBITRATION AND AWARD. *Umpire.*

An objection to an award, predicated of the fact that the umpire, who was to be called upon to act only in case of a disagreement between the arbitrators selected by the parties, was sworn and acted with the arbitrators from the beginning, is waived, if the parties are present at the hearing and do not object to such procedure. *Mississippi, etc., Co.* v. *Buster*, 91.

2. LANDLORD AND TENANT. *Lien. Deed of trust. Advances to tenant.*

A landlord who waives his lien to the extent of a designated sum in order that the tenant may secure advances from another by executing a deed of trust on his crops to be grown on the leased premises,cannot escape the effect of the waiver because the deed of trust recited that the advances were to be used also on making a crop on other lands, and did not expressly require advances to the full extent of the waiver. *Dreyfus* v. *Gage*, 219.

3. SAME. *Commingling goods. Estoppel.*

A landlord who has waived his lien for rent in favor of one who advances supplies to a tenant on the security of a deed of trust on his cotton crop, is, after receiving cotton to the amount of four bales from the tenant and mingling the same with his own, estopped to deny that a bale of cotton seized by the trustee was produced by the tenant on the demised premises. *Alexander* v. *Zeigler*, 560.

4. SALES. *Seller.*

Where defendant had agreed to take all of complainant's cotton during the season at a stipulated amount less than the actual market value of the cotton on the day on which it was sold, and on a certain day refused to pay complainant the contract price in accordance with the market quotation on that day, but thereafter complainant did not notify defendant that he intended to stand on his contract, but continued to treat the cotton as his own, and acted in accordance with a letter in which defendant repudiated the terms of its original agreement, he thereby waived his rights under the contract. *American, etc., Co.* v. *Herring*, 693.

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WIDOW.

See EXEMPTIONS, 1.

Martin v. *Martin*, 553.

WILLS.

1. CONSTRUCTION. *Technical words. Heirs. Presumption.*

   If it be apparent from a will that the testator used the word "heirs" in a different sense, the presumption that he used it in its technical sense will not prevail. *Harkleroad* v. *Bass*, 483.

2. SAME. *Case.*

   Where the manifest object of the will was to provide for the testator's infant son, and it gave him lands for life and provided "should he leave any lawful issue at his death then I will to his heirs forever, and should (he) die without heirs" the lands were to go to testator's grand-niece, the word "heirs" was used in the sense of "lawful issue," and upon the death of the son without issue the grand-niece took the estate. *Ib.*

3. HOLOGRAPH. *Private letter. Request for secrecy.*

   A letter, testamentary in its character, wholly written, dated and signed by the testator, is a valid holographic will, although it contains a request that the person to whom it was addressed should keep its contents private. *Buffington* v. *Thomas*, 157.

4. SAME. *Request for answer. Contingency.*

   An holographic will, in form a letter reciting that the testator was in bed, did not know that he would live until the next day, and requesting an answer from the person to whom it was addressed, is not dependent upon a contingency, although it was never answered and the testator lived several months after writing it. *Ib.*

5. EXPRESS TRUST. *Payment of debts.*

   A will creates an express trust for the payment of the testator's debts, which by its various items provides (1) for the payment of the debts as soon as it can be done without injury to the estate; (2) for the payment of one hundred dollars and an annuity to a servant; (3) that the testator's widow shall have all of his personal property during her life, with power to sell and dispose of it as she might see fit, but in such event the proceeds to be placed in the corpus of the estate, subject to the provisions of the will; (4) for the sale of encumbered real estate in another state "as soon as it can be done with-

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WILLS—*Continued.*

out too great loss," with discretion to lease or sell at public or private sale and authorizing the extension of the payments due on the property or the renewal or execution of other judicious loans and mortgages to pay the encumbrance; (5) full power for the executors to carry on and cultivate the testator's plantations or to lease or sell any and all real or personal property of the testator in this state, which may be deemed expedient to pay debts, but directing certain pieces of land to be reserved until the last; (6) that the widow shall claim no allowance and charge no commissions for services rendered the estate, but shall be allowed a reasonable amount for the support of herself, family, and household, to be charged against testator's estate and be decided by her own judgment; (7) that the executors shall, "subject to the foregoing articles," have the entire control of the estate, and the widow the entire use of the income, rents, and profits thereof for her life, with power to dispose of one-fourth of the estate remaining at her death by will, in default of which the one-fourth was to remain a part of the estate; and (8) for the disposal of the remainder of the estate, subject to the life estate of the widow. *Gordon* v. *McDougall*, 715.

6. EXPRESS TRUST. *Code* 1892, § 1838. *Statute of limitations on probating claims. Code* 1892, § 1933.

The statute of limitations, Code 1892, § 1933, providing that claims against the estate of a decedent shall be barred unless probated within one year after the publication of notice to creditors to probate their claims, has no application where the will of the decedent creates an express trust for the payment of debts, under Code 1892, § 1838, providing that executors, whenever empowered by the will to pay debts, shall follow the directions of the will, as well as the general principles applicable to express trusts. *Ib.*

7. SAME. *Accounting. Unprobated claims.*

Executors who have paid unprobated claims against the testator's estate, in conformity with the directions of a will, creating an express trust for their payment, should be credited therewith in their accounts. *Ib.*

WITNESSES.

1. CRIMINAL LAW. *Contradicting one's own. Hostile witness. Entrapped into introducing. Previous statements. Materiality.*

The state cannot contradict its own witness by showing his previous statements, unless entrapped into introducing a hostile one, and in such case only by showing statements which are material to the main issue. *Dunk* v. *State*, 452.

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Witnesses.

WITNESSES—*Continued.*

2. CRIMINAL LAW.

A district attorney, who calls a witness for the state without previous conference with him, cannot claim that he was entrapped and treat the witness as hostile, because his testimony is disappointing and not in harmony with what other persons had represented that it would be. *Dunk* v. *State*, 452.

3. SAME. *Evidence. Woman. Bastard.*

On the trial of a murder case it is competent for the state to show that a female witness for defendant is his mistress, but the paternity of her children by other men is incompetent. *Ivy* v. *State*, 264.

4. SAME. *Self-incrimination. Advice.*

If a female witness be asked in a murder case who is the father of her illegitimate child, she should, where her answer might subject her to a criminal prosecution, be advised by the court of her right to decline to answer the question. *Ib.*

5. ESTATE OF DECEDENT. *Competency. Code* 1892, § 1740. *Husband and wife. Ante-nuptial contract.*

Where a married woman died leaving a will and the surviving husband sought under the statute, Code 1892, § 4496, to renounce the will and take a share of her estate, in opposition to which was pleaded an ante-nuptial contract empowering the wife to dispose of her property by will as she should see proper, the husband was incompetent as a witness to impeach the contract as a forgery, under Code 1892, § 1740, providing that a person shall not testify to establish his own claim against the estate of a decedent. *Watson* v. *Duncan*, 763.

6. SAME. *Evidence. Code* 1892, § 1740. *Inheritance.*

The testimony of the heirs of the husband to a contract between him and his wife, made shortly before and in contemplation of their marriage, to the effect that the surviving husband or wife should take only a life estate in the property of the other, is not incompetent against the estate of the wife under Code 1892, § 1740, providing that no one shall testify to establish his own claim against the estate of a decedent which originated in the lifetime of the deceased, since in such case the question is one of inheritance and not a claim which originated in the lifetime of the wife. *Steen* v. *Kirkpatrick*, 63.

7. SAME. *Code* 1892, § 1740.

Witnesses are incompetent to testify to establish their own claims against the estate of a decedent, under Code 1892, § 1740, so providing. *Moore* v. *Crump*, 612.

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